BALDWIN'S OHIO LAW REVIEW AND QUIZZER

RALSTON AND McFADYEN

FULLER BAUGHMAN

BALDWIN'S OHIO LAW REVIEW AND QUIZZER

Being questions asked in the Ohio Bar Examinations for the last seven years with an answer for each question, together with outlines for review, definitions and other practical helps for the Bar Applicant

OHIO BAR EXAMINATION QUESTIONS WITH ANSWERS

BY

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OUTLINED, ARRANGED AND "KEYED" TO BATES' COMPACT OHIO DIGEST

BY

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Abbreviations

Aff. .....Affirmed or Affirming
App. .....Ohio Appellate Reports
B. .....Weekly Law Bulletin
C.C. .....Ohio Circuit Court Reports
C.C.(N.S.) ....Ohio Circuit Court Reports, New Series
C.D. .....Ohio Circuit Decisions
C.J. .....Corpus Juris
C.S.C.R. .....Cincinnati Superior Court Reports
D. .....Ohio Decisions
D. Repr. .....Ohio Decisions Reprint
G.C. .....General Code of Ohio
L.R. .....Ohio Law Reporter
Mem. .....Memorandum Decision or Decision Without Report
N.E. .....Northeastern Reporter
N.P. .....Ohio Nisi Prius
N.P.(N.S.) ...Ohio Nisi Prius Reports, New Series
O. .....Ohio Reports
O.C.A. .....Ohio Court of Appeals
O. Const. .....Ohio Constitution
O.F.D. .....Ohio Federal Decisions
O.S. .....Ohio State Reports
R.S. .....Revised Statutes of Ohio
W. .....Wright's Reports
W.L.M. .....Western Law Monthly

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WILLIAM E. BALDWIN

. . . Preface . . .

THE dean of one of Ohio's leading law schools recently said: "You may know your subject thoroughly and yet not be prepared to take the Ohio Bar Examination. The applicant must familiarize himself with the type of questions which are being asked by the examiners." For this reason this Review and Quizzer is based upon actual questions asked at recent examinations. The answers are supported by Ohio authorities. They not only answer the direct questions, but often give a general discussion of the entire phase of the law covered by the questions, to the end that the reader will be able to answer questions not only identical, to those previously asked, but also questions similar in nature.

The questions and answers are arranged chronologically in order that the user may observe the change in the type of questions asked during the past seven years.

Complete outlines precede the various subjects so that the student may obtain a general idea of the field to be covered. The various headings of the outlines are keyed to the answers following so that the user may develop his subject logically. To further assist him in this logical development of each subject, references are made to selected Ohio cases, appropriate General Code sections and Ohio practice books. Each heading is also "KEYED" to Bates' Compact Ohio Digest, which opens up a wealth of Ohio cases to the student who desires to investigate the subject more fully. Thus, this publication is arranged to meet the demands of all students, for those who are able to devote a great deal of time to review as well as those whose time is limited.

It is suggested that the student use this Review and Quizzer in conjunction with his daily work and in preparation for his school examinations. This method would assure a familiarity with Ohio law that should prove a valuable asset on the bar examination.

Valuable assistance was rendered the editors by Professor Fletcher R. Andrews, and by other members of the faculty of Western Reserve University Law School.

WILLIAM E. BALDWIN.

Cleveland, Ohio, May 1, 1929.

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BALDWIN'S OHIO LAW REVIEW AND QUIZZER

PREPARATION FOR THE BAR

The best way to prepare for the bar examination is to begin using Baldwin's Ohio Law Review and Quizzer when you enter law school. Use it every day in conjunction with your class work. Use it for your school examinations. Then review it again after you have completed your law course.

In any event every student should begin a systematic review at least four months before the examination. There are eighteen subjects to be covered, and each one should be covered twice. It is wise to cover all eighteen subjects in two months, leaving the last two months for a final review. This plan will allow more than a day and a half for each subject for both the first and second reviews. The candidate may make a timetable of the calendar in the following manner.

First—mark an X through the date of the first day of the examination.

Second—mark an X through the date upon which the review is begun.

Third—Mark an X through the date occurring half way between the day the review is begun and the day upon which the examination is to be taken. This X marks the day when all the work should have been covered once and the final review commenced. The subjects should be arranged in the order in which they are to be reviewed, the most difficult, first, as the least difficult may be covered more quickly.

Fourth—Write upon the calendar the name of the subject and the time allotted for each in order that no subject be neglected.

We suggest that the following order of study of the respective subjects be adopted—

1. Real Property
2. Suretyship
3. Pleading
4. Evidence
5. Corporations
6. Negotiable Instruments
7. Criminal Law
8. Equity

9. Constitutional Law
10. Domestic Relations
11. Contracts
12. Wills
13. Torts
14. Agency
15. Bailments
16. Partnership
17. Personal Property
18. Legal Ethics

All bar questions with a few exceptions, come under one of three classifications;

1. Definitions
2. Statutes
3. Cases actually adjudicated in Ohio

Bar examiners frequently prefer concrete questions which have come before the court in order that they may have definite references by which to grade their papers. Bearing this in mind it can easily be seen that case law is the basis of most of the bar examiner's questions.

We recommend the following text-books for a rapid review of general law principles:

Black on Constitutional Law (4th Ed.)
Burdick on Real Property.
Chapin on Torts.
Childs on Suretyship and Guaranty.
Clark on Contracts (3rd Ed.)
Gates' Ohio Corporation Manual.
Clark on Criminal Law (3rd Ed.)
Cooley on Municipal Corporations.
Deibel's Ohio Probate Manual, (Wills)
Dobie on Bailments and Carriers.
Eaton on Equity.
Gilmore on Partnership.
McKelvey on Evidence (3rd Ed.)
Norton on Bills and Notes (4th Ed.)
Tiffany on Agency.
Tiffany on Persons and Domestic Relations (3rd Ed.)
Tiffany on Sales (2nd Ed.)

These, with the exception of Deibel and Gates, are general authorities on the law of the several states. Deibel and Gates are strictly Ohio works.

In the back of Stearns on Suretyship, you will find that in his descriptive word index, he practically sums up the law of Suretyship in a few pages, though this is only sufficient to refresh the recollection and not for an original study of the subject.

Burnett's Quizzer is valuable and should be used with this work. It covers all of the Bar Examination Questions for 1919, 1920, 1921 and 1922.

Pamphlets on the following subjects may be obtained from the publisher: The Constitutions of the United States and Ohio; The General Corporation Act of Ohio; The New Code of Criminal Procedure of Ohio.

It is wise before taking the examination to go over the recent volumes of Ohio Laws and note the late changes in the statutes. Baldwin's Ohio Code Service contains these new laws and also the late annotations to the Code, which are often the subject of bar questions. The Ohio Cumulative Digest, supplementing Bates' Compact Ohio Digest, should also be examined for recent cases.

Mechem's Outlines of Agency gives the law of Agency in about 100 pages if the correct single volume work is procured. Mechem on Partnership is also good but contains over 350 pages. It should be remembered that while text books are good, our best advice is to read the statutes and cases which are listed in this book, memorize the sections designated for memory work and read the answers to the questions set out in this book.

Quick accurate thinking is essential. Every applicant is advised to look after his physical condition at least ten days previous to the examination. A man's mind is only as good as his physical condition. It is far better to know less law and think clearly than to know considerable law and think poorly since reason is the success of the examination. A fresh mind is more important than last minute preparation.

The Examination

If the $15 fee has been paid and the other requirements met, a letter should be received from the clerk's office one week before the examination assigning a number. The following is a copy of the usual rules governing the examinations.

SUPREME COURT OF OHIO

Mr. ..... No. .....

.....

INSTRUCTIONS TO APPLICANTS FOR THE OHIO STATE BAR EXAMINATION

.....and....., January 3rd and 4th, 1929.

The examination will be held at Memorial Hall, East Broad Street, Columbus, Ohio.

On arriving take your seat at the table bearing your number, as above.

There will be four sessions of one-half day each. The morning session will open at 9:00 o'clock Eastern Standard Time and close at 12:00 o'clock; the afternoon session will open at 1:30 o'clock and close at 5:00.

One hundred questions will be propounded, to be divided as equally among the sessions as it is practicable.

NOTE CAREFULLY THE FOLLOWING:

1. Each applicant will be furnished tablets and pencil. You will place your individual number **only** on the cover of each book and write upon the same the name of each subject contained therein, including the name of the examiner who has such subject. You will be known by the above number. Do not put your name upon the books.

2. DO NOT PUT SUBJECTS, OR PARTS OF SUBJECTS, OF DIFFERENT EXAMINERS IN THE SAME BOOK. **A SEPARATE BOOK MUST BE USED FOR THE SUBJECTS OF EACH EXAMINER.**

3. **WRITE ON ONLY ONE SIDE OF THE SHEET.** You may use either pen or pencil.

4. Do not write or repeat the question. Put the number of the question in the marginal space at the left of the marginal line. Put no other writing in this marginal space.

5. Do not leave the room without first obtaining permission. If you desire to ask some question, let your want be indicated by the uplift of your hand. Do not leave your seat to talk with any examiner. **No smoking in the building.**

6. Make as little noise as possible. You cannot borrow articles from one near you.

7. Read the question carefully before you attempt to answer it.

8. Answer the statement of facts given by the examiner in the question. Do not try to create your own statement of facts by saying in your answer "If this were so" or "If that were so", and then answer the statement of facts that you have created yourself.

9. Make your answers brief, clear cut and responsive to the questions.

10. Do not evade the answer by writing a treatise on the subject.

11. Efforts to dodge or the giving of double answers will not be rewarded with a grade.

12. Where a reason for the answer is asked, to entitle you to a grade, the correct reason must be given.

13. When no reason is asked for, none need be given.

14. Do not communicate with your fellow students, nor attempt, directly or indirectly, to influence any member of the Committee in your behalf. IT IS DANGEROUS.

15. Do not bring any books or manuscript to the examination.

16. If any person taking the examination is found to have in his possession any book or paper for use in aiding him to answer the questions, he will be denied a certificate even if he should pass.

17. The clerk of the Supreme Court will notify each applicant of the result of his examination and the time when, and the place where, the oath will be administered. Only the highest two grades will be made public.

LEGAL RESEARCH
INSTRUCTIONS FOR PREPARATION OF PAPERS. TIME OF RESEARCH TEST.

First Session. Nos. 1 to 85 Inc. Thursday from 9:00 to 10:00 o'clock A. M.

Second Session. Nos. 86 to 170 Inc. Thursday from 5:00 to 6:00 o'clock P. M.

Third Session. Nos. 171 to 255 Inc. Friday from 9:00 to 10:00 o'clock A. M.

Fourth Session. Nos. 256 to 340 Inc. Friday from 5:00 to 6:00 o'clock P. M.

The research Test will be given in the lobby of Memorial Hall and for that reason applicants must use the East and West Entrances to the Auditorium in entering or leaving the examination.

After carefully reading and analyzing the question you have been assigned for briefing:

1. State concisely the principle or rule of law controlling the facts of your question.

2. Cite the statute or statutes of Ohio, if any, controlling the facts of your question.

3. Cite any cases in the Ohio State Reports, in the Court of Appeals, and other Ohio reports, as ascertained from annotations to the General Code and from the Ohio Digest. (Give volume, title and page.)

4. Cite the place in Ruling Case Law where the principle or rule of law controlling the facts of your question is stated and supporting cases are listed. (Give volume, title and page.)

5. Cite the place in the Corpus Juris-Cyc System where the controlling principle is stated and the supporting authorities listed. (Give volume, title, page and section number.)

6. Cite the places in the Digest to the Lawyers Reports Annotated and the Digest to the American Law Reports where a case or cases involving the controlling principle are given. (Give volume, title and section number.)

7. Cite the places in the Northeastern Reporter Digest where a case or cases involving the controlling principle are given. (Give title and section or key number.)

8. When returning your paper, attach the question slip which was handed to you for research.

(Chairman) A. L. Gebhard.....Bryan
Carl H. Henkel.....Mansfield
Maurice Bernon.....Cleveland
Charles P. Taft, II.....Cincinnati
Charles E. Chittenden.....Toledo
John A. Elden.....Cleveland
Brandon R. Milliken.....Hamilton
G. Ray Craig.....Norwalk
Horace S. Kerr.....Columbus
Marcellus DeVaughn.....Cleveland
Bar Examining Committee.

From the above instructions, some idea of what will be demanded on the bar examination may be had.

Memorial Hall, where the examination is usually held, is located only three and a half squares from the very

center of the city and is within five minutes walking distance of almost any hotel.

Each candidate is supplied with a number and provided with an individual table bearing that number. He is also given pencils and examination books, but, it is advisable to be provided with fountain pens, blotters and erasers.

The examination usually contains one hundred questions in all, divided into four periods, two morning and two afternoon sessions. The candidate will be expected to cover four sets in each morning session and five sets in each afternoon session making eighteen sets in all. Approximately seven minutes may be spent on each question. Short speeches are usually made during a bar examination and time should be deducted for this.

"Yes and No" answers are often rewarded with better grades than long answers which are correctly answered but incorrectly reasoned.

Learn a good definition for each subject given on the bar.

Information as to the requirements for admission to the bar in Ohio may be obtained by writing to the Clerk of the Supreme Court, Columbus, Ohio.

Memory Work

Certain questions have been so often repeated, or are of such a nature that they should be given special attention, if not actually memorized, viz:

(1)

Give twelve maxims of Equity.

1. No right without a remedy;
2. Equity acts in personam;
3. Equity acts specifically;
4. Equity looks upon that as done which ought to be done;
5. Equity imputes an intention to fulfill an obligation;
6. Equity follows the law;
7. Equity comes to the diligent, not to the sleeping;
8. Equality is equity;
9. He who comes into equity must do so with clean hands;
10. He who seeks equity must do equity;
11. Between equal equities the law will prevail;
12. Between equal equities priority of time will prevail. (Bispham on Equity.) For Gibson's twelve tables of Equity see Gibson's Suits In Chancery, 1929, § 41.

(2)

Give the preamble to the federal constitution.

1. We, the people of the United States,
2. in order to form a more perfect union;
3. establish justice;
4. insure domestic tranquility;
5. provide for the common defense;
6. promote the general welfare, and
7. secure the blessings of liberty to ourselves and our posterity,
8. do ordain and establish this constitution for the United States of America.

(3)

Give the preamble to the Ohio constitution.

We, the people of the state of Ohio, grateful to Almighty God for our freedom, to secure its blessings and promote our common welfare, do establish this constitution.

(4)

Give ten grounds for demurring to a petition.

1. Court has no jurisdiction of the person of the defendant;
2. Court has no jurisdiction of the subject of the action;
3. Plaintiff has no legal capacity to sue;
4. There is another action pending between the same parties for the same cause;
5. There is a misjoinder of parties plaintiff or defendant;
6. There is a defect of parties plaintiff or defendant;
7. Several causes of action are improperly joined;
8. Separate causes of action against several defendants are improperly joined;
9. The action was not brought within the time limited for the commencement of such actions; or
10. The petition does not state facts which show a cause of action. (G. C. § 11309.)

(5)

What are the requisites of testamentary capacity in Ohio?

The testator must be able to:

1. Understand the nature of the business in which he is engaged;
2. Comprehend generally the nature and extent of his property;
3. Hold in mind the names and identity of those who have natural claims upon his bounty;
4. To appreciate his relation to the members of his family. (Niemes v. Niemes 97 O. S. 145, 119 N. E. 132.)

(6)

Give the oath of admission to the bar.

I DO SOLEMNLY SWEAR:

1. I will support the constitution of the United States and the constitution of the state of Ohio;
2. I will maintain the respect due to courts of justice and judicial officers;
3. I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust nor any defense except such as I believe to be honestly debatable under the law of the land;
4. I will employ for the purpose of maintaining the causes confided to me, such means only as are consistent

with truth and honor, and will never seek to mislead the judge or jury by any artifice or false statement of fact or law;

5. I will maintain the confidence and preserve inviolate the secrets of my client, and will accept no compensation in connection with his business except from him and with his knowledge and approval;

6. I will abstain from all offensive personality, and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;

7. I will never reject, from any consideration, personal to myself, the cause of the defenseless or oppressed, or delay any man's cause for lucre or malice. SO HELP ME, GOD. (Canons of Ethics).

(7)

What are the elements of a contract?

1. Offer and acceptance;
2. Form and consideration;
3. Capacity of the parties;
4. Genuiness of consent;
5. Legality of object. (Anson on Contracts, p. 10.)

(8)

What pleadings are allowed by the Code?

The only pleadings in civil actions are:

1. Petition;
2. Demurrer to petition;
3. Answer, which if it demands affirmative relief may be styled a cross-petition;
4. Demurrer to answer;
5. Reply;
6. Demurrer to reply. (G. C. § 11303.)

(9)

What are the formal requisites of a negotiable instrument?

An instrument to be negotiable must conform to the following requirements:

1. It must be in writing and signed by the maker or drawer;
2. Must contain an unconditional promise or order to pay a sum certain in money;
3. Must be payable on demand, or at a fixed or determinable future time;
4. Must be payable to order or to bearer; and
5. When the instrument is addressed to a drawee, he

must be named or otherwise indicated therein with reasonable certainty. (G. C. § 8106.)

(10)

Give the ten grounds for divorce in Ohio.

1. That either party had a husband or wife living at the time of the marriage from which the divorce is sought;
2. Wilful absence of either party from the other for three years;
3. Adultery;
4. Impotency;
5. Extreme cruelty;
6. Fraudulent contract;
7. Gross neglect of duty;
8. Habitual drunkenness for three years;
9. The imprisonment of either party in a penitentiary under sentence thereto. The petition for divorce under this clause must be filed during the imprisonment of the adverse party;
10. The procurement of a divorce without this state, by a husband or wife, by virtue of which the party who procured it is released from the obligations of the marriage, while they remain binding upon the other party. (G. C. § 11979.)

(11)

Give the most important rules applicable to the Construction of Wills.

The "Five Fundamentals of Will Construction" are:

I.—The sole end in construing a will, is to ascertain the testator's intention.

II.—The testator's intention must be ascertained from the language he used in the will.

III.—The language the testator used in the will, is construed in the light of the circumstances under which he used it.

IV.—Every part of the will is construed from its four corners.

V.—Wills are liberally construed in order to give effect to the testator's intention.—Deibel's Ohio Probate Manual, § 578.

Important rules of construction in addition to the above are:

1 There is a presumption against partial intestacy.
2. There is a presumption against an illegal and unjust result.
3. Blood relatives are preferred to strangers, and heirs to devisees.
4. There is a presumption against implied gifts.
5. The latter of two irreconcilable provisions, prevails.

6. A limitation on a fee simple devise, is void for repugnancy.

7. In general, a will speaks from the death of the testator.

8. The law favors vested as against contingent bequests.

9. The law favors conditions subsequent as against conditions precedent.

10. The law favors charitable gifts.

11. The law favors general as against specific legacies.

12. There is a presumption that a bequest to a group is to the individuals constituting it, and not to the group as a class subject to the incident of survivorship.

Deibel's Ohio Probate Manual, § 585.

(12)

What are the exceptions to the rule excluding the admission of hearsay evidence?

The exceptions are as follows:

1. In those cases where the fact that the declaration was made, and not its truth or falsity, is the point in question;

2. Declarations as to pedigree;

3. Declarations, exclamations and statements which constitute part of the res gestae;

4. Entries in books in the regular course of business, or in discharge of official duty;

5. Entries in books, by one since deceased, made against his own interest;

6. Matters of public and general interest;

7. Declarations against interest;

8. Ancient documents in support of ancient possession;

9. Dying declarations;

10. Testimony of witnesses subsequently dead, disqualified or absent;

11. Admissions and confessions. 1 Greenleaf on Evidence, §§ 102 et seq.; McKelvey on Evidence.

(13)

What contracts must be in writing to be enforcible?

The following contracts must be in writing:

1. To answer for the debt, default or miscarriage of another person;

2. To charge an executor or administrator upon a special promise, to answer damages out of his own estate;

3. Agreement made upon consideration of marriage;

4 Sale of lands, tenements or hereditaments or interest therein, or concerning them;

5. Agreement not to be performed within one year. (G. C. § 8621.)

Sub-div. 6. Contracts for sale of goods or choses in action of over $2,500, unless buyer accept part and actually receive it, or give something in earnest to bind the contract, or in part performance thereof. (G. C. § 8384.)

(14)

State in what controversies the jurisdiction of the United States courts may be invoked.

The judicial power shall extend to all cases, in law and equity, arising

1. Under the constitution;
2. The laws of the United States;
3. Treaties made under their authority;
4. All cases affecting ambassadors, other public ministers, and consuls;
5. All cases of admiralty and maritime jurisdiction;
6. Controversies to which the United States shall be a party;
7. Controversies between two or more states;
8. Between a state and citizens of another state;
9. Between citizens of different states;
10. Between citizens of the same state, claiming land under grants of different states;
11. Between a state or citizens thereof, and foreign states, citizens or subjects. (Federal Constitution Art. III § 2.)

The 11th Amendment provides that, "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens of any foreign state."

(15)

How are bailments classified? Give the degree of care required to be exercised by the bailee in each classification.

Bailments fall into two classes; (1) Bailments for the benefit of one party, and (2) Bailments for the mutual benefit of both parties. These divisions are in turn subdivided as follows:

1. For the benefit of one party:
   (a) Deposit or (depositum)
   (b) Mandate or (mandatum) For sole benefit of bailor.

(c) Commodatum...i. e... (a gratuitous loan) and is for the sole benefit of bailee.

2. For the mutual benefit of both parties:
   (a) Pledge or (pawn) or (pignus)
   (b) Locatio Rei, (hired use of an article of bailor)
   (c) Locatio Operis. (This division is again divided thus:)
   1. Locatio Custodiae (meaning hired custody of a thing.)
   2. Locatio Operis Faciendi (meaning hired services upon a thing.)
   3. Locatio Operis Mercium Vehendarum (meaning hired carrying of a thing.)

(b) The degree of care required to be exercised by a bailee in each classification is as follows:

In bailments for the sole benefit of the bailor, which are deposits and mandates, the bailee is only required to exercise slight care and therefore is liable only for gross negligence.

In bailments for the sole benefit of the bailee, which are commodatum bailments, the bailee is required to exercise great care and is liable for slight negligence.

In bailments for the benefit of both parties or mutual benefit bailments as they are usually called, which include pledges and locatio bailments, the bailee is required to exercise ordinary care. (See Bouvier's Law Dictionary, Baldwin's Revision.

(16)

How is equity divided?

Equity is divided into three main classifications, namely:

1. Titles
2. Rights
3. Remedies

Each of these divisions are in turn sub-divided as follows:

1. Titles
   (a) Trusts
   (b) Mortgages
   (c) Assignments

2. Rights
   (a) Accident
   (b) Mistake
   (c) Fraud
   (d) Notice
   (e) Estoppel

3. Remedies
   (a) Specific performance
   (b) Accounting
   (c) Partition
   (d) Rescission
   (e) Reformation

(f) Marshalling	(f) Cancellation
(g) Conversion	(g) Injunction
etc.	etc.

(17)

How may title to personal property be acquired?

Title to personal property may be acquired in any one of the following ways:

1. Gift or grant;
2. By sucession;
3. By marriage;
4. By occupancy;
5. By prerogative;
6. By forfeiture;
7. By judgment;
8. By contract;
9. By bankruptcy;
10. By testament;
11. By administration;
12. By custom.

(Blackstone's Comm., Vol. 2.)

(18)

Give the different ways in which the constitution of the United States may be amended.

An amendment may be proposed by two-thirds of both houses of congress and may be ratified by the legislatures of three-fourths of the states or it may be ratified by conventions in three-fourths of them.

Congress shall, on application of two-thirds of the legislatures of the states, call a convention for proposing amendments, which shall become valid amendments to the constitution when ratified either by the legislatures of three-fourths of the states or by conventions in three-fourths of them. (Constitution of the United States, Art. V.)

(19)

How may the Ohio constitution be amended?

The Ohio constitution may be amended as follows:

1. Ten percent of the electors may propose the amendment which upon filing of their petition, will be submitted to the electors.

2. A convention to amend the constitution may be called by a vote of two-thirds of the members of each house.

3. Three-fifths of the members of the two houses concurring, may propose an amendment which shall be submitted to the electors.

4. Beginning with 1932, and every twenty years thereafter, the question of a revision of the constitution shall

be submitted to the electors by a vote to call a constitutional convention.

The proposed amendment shall become a part of the constitution upon ratification by a majority of the electors.

(20)

What is meant by the term "rule day" and what are the rule days under the Ohio Code?

Rule day is the last day within which a pleading may be filed in an action.

Gen. Code 11346 provides that an answer or demurrer to the petition shall be filed on or before the third Saturday, the reply or demurrer to the answer, on or before the fifth Saturday, and the demurrer to the reply, on or before the seventh Saturday after the return day of the summons or service by publication. The answer or demurrer of a defendant to an answer demanding affirmative relief shall be filed on or before the third Saturday, the reply or demurrer thereto on or before the fifth Saturday, and the demurrer to the reply, on or before the seventh Saturday, after such answer is filed. (G. C. § 11346.)

(21)

Name the different degrees of murder in Ohio and define each.

Murder in the first degree; murder in the second degree.

Whoever, purposely, and either of deliberate and premeditated malice, or by means of poison, or in perpetrating or attempting to perpetrate rape, arson, robbery or burglary, kills another, is guilty of murder in the first degree, and shall be punished by death unless the jury trying the accused recommend mercy, in which case the punishment shall be imprisonment in the penitentiary during life. Throckmorton's General Code of Ohio, § 12400.

Whoever maliciously places an obstruction upon a railroad, or displaces or injures anything appertaining thereto, with intent to endanger the passage of a locomotive or car, and thereby occasions the death of another, is guilty of murder in the first degree and shall be punished by death unless the jury trying the accused recommend mercy, in which case the punishment shall be imprisonment in the penitentiary during life. Throckmorton's General Code of Ohio, § 12401.

Whoever, being a convict or prisoner employed at work or at a place provided by law, in the custody of guards or officers, kills one of such guards or officers or inflicts injuries upon him which result in death, shall be guilty of murder in the first degree and shall be punished by death unless the jury trying the accused recommend mercy, in

which case the punishment shall be imprisonment in the penitentiary during life; or, whoever, being one of three or more such convicts or prisoners who conspire together so to do, shall be imprisoned in the penitentiary not more than twenty years, and such sentence shall be in addition to any existing sentence or sentences against such persons. Solitary confinement may be a part of such sentence of imprisonment. Throckmorton's General Code of Ohio, § 12402.

Whoever purposely and wilfully kills a sheriff, a deputy sheriff, constable, policeman, marshal or inspector appointed under the provisions of § 6212-22 of the General Code, while such sheriff, deputy sheriff, constable, policeman, marshal or inspector is in the discharge of his duties, is guilty of murder in the first degree and shall be punished by death unless the jury trying the accused person recommend mercy, in which case the punishment shall be imprisonment in the penitentiary during life. Throckmorton's General Code of Ohio, § 12402-1.

Whoever, purposely and maliciously kills another, except in the manner described in the next three preceding sections, is guilty of murder in the second degree and shall be imprisoned in the penitentiary during life. Throckmorton's General Code of Ohio, § 12403.

(22)

Give four ways in which the relation of principal and agent may be formed.

1. Agreement; 2. Estoppel; 3. Ratification; 4. Necessity. (Huffcut on Agency § 9).

(23)

Who is deemed a holder in due course?

Every holder is deemed a holder in due course until the contrary appears. (G. C. § 8164.)

One is a holder in due course who has taken the instrument under the following conditions:

1. That it is complete and regular on its face.
2. That he became the holder of it before it was overdue, and without notice that it previously had been dishonored, if such was the fact.
3. That he took it in good faith and for value.
4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it. (G. C. § 8157.)

(24)

How may a negotiable instrument be discharged?

1. By payment in due course by or on behalf of the principal debtor.

2. By payment in due course by the party accomodated, when the instrument is made or accepted for accomodation.
3. By its intentional cancellation by the holder.
4. By any other act which will discharge a simple contract for the payment of money.
5. When the principal debtor becomes a holder of the instrument at or after maturity in his own right. (G. C. § 8224.)

(25)

How is a person secondarily liable on the instrument discharged?

1. By any act which discharges the instrument.
2. By the intentional cancellation of his signature by the holder.
3. By the discharge of a prior party.
4. By a valid tender of payment made by a prior party.
5. By a release of the principal debtor, unless the holders right of recourse against the party secondarily liable is expressly reserved.
6. By any agreement binding upon the holder to extend the time of payments, or to postpone the holder's right to enforce the instrument, unless made with the assent of the person secondarily liable, or unless the right of recourse against such party is expressly reserved. (G. C. § 8225).

(26)

What causes of action may be joined in the same petition under the law of Ohio?

The plaintiff may unite several causes of action in the same petition, whether they are legal or equitable, or both, when they are included in any of the following classes:

1. The same transaction;
2. Transactions connected with this same subject of the action;
3. Contracts, express or implied;
4. Injuries to person or property, or to either;
5. Injuries to character;
6. Claims to recover the possession of personal property, with or without damages for withholding it;
7. Claims to recover real property, with or without damages for withholding it, its rents and profits, and the partition thereof;
8. Claims to recover possession of real property in forcible entry and detainer, and claims for rent, with or without damages for breach of any condition of the tenancy.
9. Claims to foreclose a mortgage given to secure the payment of money or to enforce a specific lien for money,

and to recover a personal judgment for the debt secured by such mortgage or lien;

10. Claims against a trustee by virtue of a contract, or by operation of law. (G. C. § 11306, as amd. 1929.)

(27)

What must be set forth in the articles of incorporation of a private corporation?

Any number of natural persons, not less than three, a majority of whom are citizens of the United States, may become a corporation, by subscribing, acknowledging and filing in the office of the secretary of state articles of incorporation, hereinafter called articles, setting forth:

1. The name of the corporation, which may begin with the word "the" and shall end with or include "company," "co.," "corporaton," "incorporated" or "inc.," except as otherwise provided by law.

2. The place in this state where the principal office of the corporation is to be located.

3. The purpose or purposes for which it is formed.

4. The maximum number and the par value of shares with par value, and the maximum number of shares without par value which the corporation is authorized to have outstanding; and if the shares are to be classified—

(a) the designation of each class, the number and par value, if any, of the shares of each class and, if desired, of the series of any class; and

(b) the express terms and provisions of the shares of each class. * * *

5. The amount of capital with which the corporation will begin business, which shall be not less than five hundred dollars.

6. If desired, the amount of consideration for which subscriptions to shares without par value may be received by the incorporators, and the valuation of any considerations to be received for shares either with or without par value proposed to be presently issued.

7. Any lawful provisions which may be desired for the purpose of defining, limiting and regulating the exercise of the authority of the corporation, or of the directors or of the shareholders or of any class of shareholders, or for the purpose of creating and defining rights and privileges of the shareholders among themselves. Any provision authorized to be made in the regulations of a corporation may, if desired, be made in its articles.

If the corporation is for a purpose which includes the constructon of a steam or electric railroad in more than one county or state, the articles shall also set forth its termini and the counties in this state into or through which it or its branches will pass.

A written appointment of an agent upon whom process, tax notices and demands against such corporation may be served as hereinafter provided shall be filed with the articles. G.C.§ 8623-4. (Amended, 1929.)

(28)

Define vendor's lien. What rights does the vendor have? Third parties? How may the lien be waived?

As between the vendor and vendee of land the vendor shall have a lien for so much of the purchase money as remains unpaid. But such lien shall not be effective as against a purchaser, mortgagee, judgment creditor, or other encumbrancer, unless there be a recital or a reservation of the lien in the deed, or in some instrument of record executed with the same formalities as are required for the execution of deeds and mortgages of land. By taking back a mortgage, for any unpaid purchase money, on the land conveyed or any part thereof, the vendor shall be deemed to have waived his vendor's lien, and the filing for record of such a mortgage with the recorder of the county wherein said land is located shall be constructive notice of the waiver of the vendor's lien. G.C.§ 8543-1. (Enacted, 1929.)

(29)

Define "reasonable doubt."

A defendant in a criminal action is presumed to be innocent until he is proved guilty of the crime charged, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he shall be acquitted. But the effect of this presumption of innocence is only to place upon the state the burden of proving him guilty beyond reasonable doubt. Reasonable doubt is defined as follows: "It is not a mere possible doubt, because everything relating to human affairs or depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge." In charging a jury the court shall state the meaning of presumption of innocence, and read the foregoing definition of reasonable doubt. Code of Criminal Procedure, Chapt. 21, § 3. (Enacted, 1929.)

(30)

Name the five pleas to an indictment or information.

There are five (5) kinds of pleas to an indictment or information:

1. Guilty.
2. Not guilty.
3. A former judgment of conviction or acquittal of the offense.
4. Once in jeopardy.
5. Not guilty by reason of insanity.

A defendant who does not plead guilty, may enter one or more of the other pleas. A defendant who does not plead not guilty by reason of insanity shall be conclusively presumed to have been sane at the time of the commission of the offense charged, provided, that the court may, for good cause shown, allow a change of plea at any time before the commencement of the trial. Code of Criminal Procedure, Chapt. 19, § 2. (Enacted, 1929.)

(31)

Give the general form of an indictment.

The indictment may be substantially in the following form:

The State of Ohio, }
} ss.
..... County. }

Of the Term of.....in the Year of our Lord one thousand nine hundred and.....

The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that A. B., on the.....day of....., 19...., at the County of..... aforesaid, did.....(here insert the name of the offense if it has one, such as murder, arson or the like, or if a misdemeanor having no general name, insert a brief description of it as given by law) contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

.....C. D.....
Prosecuting Attorney.

(Indorsed) A true bill.
E. F., Foreman of the Grand Jury.

Code of Criminal Procedure, Chapt. 16, § 5. (Enacted, 1929.)

(32)

May an indictment or information be quashed, set aside or dismissed because:

(1) There is a misjoinder of the parties accused
(2) There is a misjoinder of the offenses charged in the indictment or information or duplicity therein
(3) That any uncertainty exists therein?

No indictment or information shall be quashed, set aside or dismissed for any one or more of the following

defects: (First) That there is a misjoinder of the parties accused; (Second) That there is a misjoinder of the offenses charged in the indictment or information, or duplicity therein; (Third) That any uncertainty exists therein. If the court be of the opinion that the first and second defects or either of them exists in any indictment or information, it may sever such indictment or information into separate indictments or informations or into separate counts as shall be proper. If the court be of the opinion that the third defect exists in the indictment or information, it may order that the indictment or information be amended to cure such defect, provided, no change is to be made in the name or identity of the crime charged. Code of Criminal Procedure, Chapt. 16, § 27. (Enacted, 1929.)

Agency

(Numbers in parenthesis refer to answers following.)

I. WHO CAN BE AGENT. (18, 29)

Infants, 4-1; Husband and Wife, 6, 7, 68; Banks and Banking, 84; Partnership, 61.

G.C. §§ 710-158, 710-159, 8318; 13 C.C. 482, 484; 7 C.D. 113.

II. WHO CAN BE A PRINCIPAL. (14)

Principal and Agent, 66.

10 O. 37; Huffcutt 2nd Ed., page 28.

III. CREATION OF AGENCY. (10, 28, 37, 41, 42)

Principal and Agent, 1, 41.

G.C. §§ 8512, 8621; 22 O.S. 62; 59 O.S. 28; 12 App. 210; 24 App. 15; 7 C.C.(N.S.) 173; 9 N.P.(N.S.) 465.

IV. AGENT DISTINGUISHED FROM INDEPENDENT CONTRACTOR.

Master and Servant, 7, 162 to 165.

5 O.S. 38; 21 O.S. 212; 39 O.S. 461; 47 O.S. 207; 61 O.S. 215; 115 O.S. 594; 22 C.C. 437.

V. TRANSFER OF SERVANTS, LIABILITY OF NEW PRINCIPAL.

Master and Servant, 7, 164.

113 O.S. 613; 19 N.P.(N.S.) 153; 15 O.F.D. 488.

VI. TORT LIABILITY OF MASTER OR PRINCIPAL.

A. Negligence. (15, 40, 51)

Master and Servant, 147, 151, 154, 157; Corporations, 288.

67 O.S. 91; 88 O.S. 18; 101 O.S. 75; 107 O.S. 204; 119 O.S. 9; 23 App. 458; 24 App. 395; 20 C.C.(N.S.) 182; 22 C.C.(N.S.) 585.

B. Wilful Torts. (15, 40, 57, 58)

Master and Servant, 154 to 158; Principal and Agent, 57.

~~19 O.S. 110~~; 21 O.S. 518; 47 O.S. 387; ~~60 O.S. 448~~; ~~95 O.S.~~ 42; 109 O.S. 526; 115 O.S. 298; 9 App. 91.

C. Contractual Relationships. (15, 48)

Master and Servant, 1.

~~55 O.S. 39~~8; 108 O.S. 484; 116 O.S. 299; ~~9 App. 16.~~

D. Family Automobile. (52)

Parent and Child, 25.

~~100 O.S. 186~~; 102 O.S. 105; 14 L.R. 9, 1916.

[*References are to Bates' Compact Ohio Digest.*]

E. Municipal Corporations.

Municipal Corporations, 525 to 535, 558 to 561.

G.C. § 3714; 4 O. 500; 41 O.S. 149; 58 O.S. 538; 106 O.S. 342; 108 O.S. 122; 116 O.S. 281; 15 C.C. 627; 25 C.C.(N.S.) 303; 28 O.C.A. 25; 14 N.P.(N.S.) 193.

F. Charitable Institutions.

Hospitals, 5.

85 O.S. 90; 104 O.S. 61; 115 O.S. 539; 7 N.P. 514.

VII. CONTRACT LIABILITY OF PRINCIPAL.

A. Implied Authority, Unauthorized Acts, and Powers of Agent. (7, 8, 16, 17, 22, 40, 49)

Principal and Agent, 4, 38, 39, 48, 63; Parent and Child, 24.

G.C. §§ 8318, 8993-22; ~~22 O.S. 118~~; 39 ~~O.S. 671~~; 68 O.S. 442; 71 O.S. 220; ~~74 O.S. 284~~; 78 O.S. 104; 88 O.S. 192, 199; 104 O.S. 427; 4 C.C.(N.S.) 264; 9 C.C. (N.S.) 166; 22 C.C.(N.S.) 112; 22 C.C.(N.S.) 569.

B. Fraud and Misrepresentation of Agent. (4, 11, 16, 19, 32, 34)

Principal and Agent, 57, 59, 62, 63.

G.C. §19; 30 O.S. 647; 37 O.S. 356; ~~40 O.S. 313~~; 56 O.S. 351; 91 O.S. 268.

C. Forging Principal's Name; Estoppel. (28)

Principal and Agent, 65.

84 O.S. 297; 95 O.S. 253; 24 App. 129.

VIII. LIABILITY OF PRINCIPAL FOR CRIMES OF AGENT.

Master and Servant, 158.

22 O.S. 305; 16 C.C. 31; 4 C.C.(N.S.) 193; 10 C.C.(N.S.) 371.

IX. NOTICE TO AGENT AS BINDING ON PRINCIPAL.

Principal and Agent, 73 to 76.

G.C. §§ 11534, 11535; ~~30 O.S. 647~~; 101 O.S. 180; 108 O.S. 175; ~~115 O.S. 298~~; 12 App. 63; 4 N.P.(N.S.) 487.

X. ADMISSIONS. (21)

Principal and Agent, 5, 44; Evidence, 547.

8 C.C.(N.S.) 202; 9 C.C.(N.S.) 433; 17 C.C.(N.S.) 209; 17 C.C.(N.S.) 495.

XI. AGENT'S LIABILITY FOR WILFUL TORTS OR NEGLIGENCE. (5, 35, 47)

Principal and Agent, 11, 50, 60, 61, 65.

G.C. §§ 710-172, 710-182, 5686; 7 O.S. 226; 112 O.S. 476.

XII. AGENT'S LIABILITY FOR UNAUTHORIZED CONTRACT. (4, 8, 26, 55)

Principal and Agent, 50, 58, 63.

47 O.S. 525; 16 App. 41; 22 C.C.(N.S.) 569; 3 D. 525.

XIII. UNDISCLOSED PRINCIPAL. (17, 20, 55)

Principal and Agent, 51 to 56.

20 O.S. 259; ~~24 O.S. 28~~; 39 O.S. 79; 39 ~~O.S. 100~~; 54 O.S. 425; 9 C.C. 107; 19 C.C. 615; 13 N.P.(N.S.) 505.

XIV. LIABILITY OF PARTIES TO WRITINGS.

A. Simple Contracts. (46)

Principal and Agent, 50.

8 O. 169; 8 O.S. 520, 545; 13 O.S. 574; 21 O.S. 492.

B. Negotiable Instruments. (21, 24)

Bills and Notes, 21, 62, 63.

G.C. §§ 8124, 8125; 10 O.S. 444; 17 O.S. 125; 38 O.S. 442; 65 O.S. 178; 72 ~~O.S.~~ 551; 18 App. 88; 24 ~~C.C.(N.S.)~~ 143.

XV. FELLOW-SERVANT RULE.

Master and Servant, 56 to 77.

G.C. § 9016; 20 O. 415; 3 O.S. 201; 31 O.S. 287; 37 O.S. 667; 42 O.S. 318; 51 ~~O.S.~~ 542.

XVI. WORKMEN'S COMPENSATION.

Workmen's Compensation Act, 1 et seq.

O. Const. Art. 2, § 35; G.C. §§ 1465-60 et seq, 6241 to 6245-1; 80 O.S. 289; 109 O.S. 341; 113 O.S. 1; 115 O.S. 91; 115 O.S. 152; 115 O.S. 117; 116 O.S. 67; 14 N.P.(N.S.) 166.

XVII. COMPENSATION AND INDEMNITY OF AGENT. (14, 23, 25, 33, 36, 43, 50)

Principal and Agent, 25 to 31.

G.C. §§ 5687, 8621; 16 O. 412; 37 O.S. 397; 40 O.S. 203; 100 O.S. 403; 110 O.S. 347; 115 O.S. 502; 116 O.S. 29; 116 O.S. 631; 10 App. 454; 17 App. 232; 17 App. 237; 23 App. 249; 23 App. 279; 10 C.C.(N.S.) 342; 23 C.C.(N.S.) 571, 573; 17 N.P.(N.S.) 419; 2 O.F.D. 34.

XVIII. MUTUAL DUTIES BETWEEN PRINCIPAL AND AGENT. (4, 12, 27, 32, 33, 44, 50)

Principal and Agent, 11 to 24, 32, 56.

8 O.S. 1, 22; 21 O.S. 492; 41 O.S. 100; 51 O.S. 376; 64 O.S. 100; 116 O.S. 373; 5 O.F.D. 325.

XIX. DELEGATION OF AGENT'S AUTHORITY. (38c, 53)

Principal and Agent, 46.

8 O.S. 270; 8 O.S. 465; 41 ~~O.S.~~ 519; 46 O.S. 224; 86 O.S. 286.

XX. TERMINATION OF AGENCY.

A. Power Coupled With Interest. (9, 30, 45)

Principal and Agent, 8.

8 O. ~~168~~; 5 D. 8.

B. Death. (2, 13, 38a)

Principal and Agent, 8, 9.

13 O.S. 574; 13 C.C.(N.S.) 598; 5 D. 8; 7 O.F.D. 159.

C. Revocation. (38b)

Principal and Agent, 6, 28.

76 ~~O.S.~~ 138.

XXI. RATIFICATION. (1, 6, 16, 25, 36, 43, 49)

Principal and Agent, 66 to 72.

8 O.S. 270; 22 O.S. 597; 24 O.S. 67; 32 ~~O.S.~~ 514; 34 O.S. 450; 66 O.S. 6; 84 O.S. 297; 91 ~~O.S.~~ 268; 96 O.S. 74; 100 O.S. 403; 115 O.S. 161.

XXII. FACTOR'S ACTS.

Factors, 1 et seq.

G.C. §§ 8358 to 8364; 6 O.F.D. 293.

Definitions

AGENCY.—A relation between two or more persons, by which one party, usually called the agent, is authorized to do certain acts for, or in relation to the rights or property of, the other, who is denominated the principal. Bouvier's Law Dictionary, Baldwin's Revision.

AGENT.—One who undertakes to transact some business, or to manage some affair, for another, by the authority and on account of the latter. Bouvier's Law Dictionary, Baldwin's Revision.

PRINCIPAL.—One who, being competent sui juris to do any act for his own benefit or on his own account, confides it to another person to do for him. Bouvier's Law Dictionary, Baldwin's Revision.

INDEPENDENT CONTRACTOR.—One who, exercising an independent employment, contracts to do a piece of work according to his own methods, and without being subject to the control of his employer, except as to the result of his work. Bouvier's Law Dictionary, Baldwin's Revision.

RATIFICATION.—Express ratifications are those made in express and direct terms of assent. Implied ratifications are such as the law presumes from the acts of the principal; as, if Peter buy goods for James, and the latter, knowing the fact, receive them and apply them to his own use. Bouvier's Law Dictionary, Baldwin's Revision.

FACTOR.—An agent employed to sell goods or merchandise consigned or delivered to him, by or for his principal, for a compensation, commonly called factorage or commission. Bouvier's Law Dictionary, Baldwin's Revision.

COUPLED WITH AN INTEREST.—The phrase "coupled with an interest," in connection with a power of attorney, does not mean an interest in the exercise of the power, but an interest in the property on which the power is to operate. Bouvier's Law Dictionary, Baldwin's Revision.

WITHIN THE SCOPE OF EMPLOYMENT.—In determining whether a particular act was done in the course or within the scope of the agent's employment two things are always to be primarily considered. First—Was the agent engaged at the time in serving his principal? Second—Even though so engaged, was the act complained of within the scope of the agent's employment? Lima Ry. v. Little, 67 O.S. 99, See VI (A) and (B) above.

SUPERIOR OFFICER AND FELLOW SERVANT.—See G.C. §§ 6242, 9016.

OHIO STATE BAR EXAMINATIONS

QUESTIONS WITH ANSWERS

[*Arranged Chronologically.*]

(1)

White is a stockholder of the Black Flour Co. Without communicating his intentions to the company, White enters into a written contract as agent for the company selling to Green 5000 barrels of bread flour, 2500 barrels of pastry flour and 1000 barrels of rolled oats. The company ships the bread flour and pastry flour but refuses to ship the oats, stating as a reason that White was not an agent of the company. Green loses $500 as a result of the non-delivery of the rolled oats. Can Green recover his loss from the Black Flour company? State reasons. Be brief!

Yes.

It is a fundamental rule that, if the principal elects to ratify any part of the unauthorized act, he must, so far as it is entire, ratify the whole of it. He cannot avail himself of it so far as it is advantageous to him and reject it as to the residue. He cannot take the benefits and repudiate the obligations; and this rule applies not only when his ratification is express, but also when it is implied, if the requirement of knowledge in satisfied. Especially is this true where the person who did the act was not an agent for any purpose. (Mechem on Agency §.410).

Here no part of his act was authorized, and there is no room for selection of a portion and the rejection of the residue. Stated affirmatively, the ratification of part of an entire act or transaction, will usually be a ratification of the whole of it, if there was knowledge of the material facts.

The susequent ratification of the acts performed by a third person professedly acting as agent, by the principal, will conform and establish the authority of the agent, and, generally, if the principal receive and hold the proceeds or beneficial results of the contract, with knowledge of the material facts, he will not be permitted to deny the authority of the agent, for it is in effect, a ratification of the contract. So, if the principal does not disavow the acts of his agent as soon as he can after they come to his knowledge, he makes these acts his own, and the principal cannot, in general, adopt a part and disavow a part of the contract of a person who purports to be his agent. (United States Rolling Stock Co. v. Atlantic and Great Western R. R. Co., 34 O. S. 450).

If as appears the contract was an indivisible contract (ie: not separate contracts on separate considerations for the delivery of bread flour, pastry flour and rolled oats) the

principal cannot affirm a part of the contract and disaffirm part. (Miller v. Glockner, 1 App. 149).

(2)

John Jones executes a power of attorney, designating George Smith as his attorney in fact. One clause reads as follows:

"I, John Jones, declare this power of attorney to be irrevocable on my part for a period of twenty years after date and further declare that in the event of my death this power of attorney shall survive me and be binding on my heirs and personal or legal representatives. For all his services under this power of attorney George Smith is to receive no profit from this venture except the sum of Ten Thousand Dollars for services, receipt of which he acknowledges, the date below written."

Smith accepts and signifies so by his endorsement and receives $10,000 from Jones. One year later Jones dies and Smith refuses to perform any duties under this power of attorney and refuses to act. Can the administrator or heirs of Jones' estate compel Smith to perform under the agreement? Why? Be brief.

No.

The death of the principal operates as a revocation of an agency. (Ish v. Crane, 13 O. S. 574).

In the present case the power is not coupled with an interest. In cases where an agent has an interest only in that which is produced by the exercise of the power, and no interest in the thing itself upon which the power is to be exercised, his authority ceases upon the death of his principal.

Furthermore the provision that death shall not terminate the power has no force or effect. (21 R. C. L. p. 888).

A power of attorney, though irrevocable during the life of the party becomes at law extinct by his death; but if the power be coupled with an interest, it survives the person giving it, and may be executed after his death. (Hunt v. Rousmanier's Admr's, 8 Wheaton (U. S.) 174).

(3)

John Jones and Mary Jones are husband and wife.

John Jones has title to all the household furniture. With the consent of his wife, John Jones borrows $500 from a loan company to meet household expenses. He executes a chattel motgage on the household furniture to secure payment. Jones defaults and the mortgage company brings suit to foreclose the mortgage. Mary Jones, waiving her homestead exemptions, intervenes and claims that she did not join in the execution of the mortgage. Can she prevail? State reasons. Be brief.

Yes.

Prior to the enactment of G. C. §.8565-1, a husband could make an absolute conveyance or incumbrance of his chattel property without joining his wife with him in the transaction and on foreclosure the wife would not be entitled to five hundred dollars in lieu of homestead out of proceeds of sale. (Donnelly v. Lulfs 12 App. 305, 30 O. C. A. 583).

But now G. C. § 8565-1 (108 v. 13) provides as follows: "It shall be unlawful for either husband or wife (where that relation exists) to create any lien by chattel mortgage or otherwise upon any personal household property owned by either, or both of them, without the joint consent of both husband and wife, and from and after the time this act shall take effect, no such mortgage of such personal household property shall be valid, unless executed by both husband and and wife."

(4)

Brown is selling agent for the Blank Iron Company. Brown represents to the Blank Iron Company that he is selling a quantity of iron to Smith for $10,000. Brown takes the iron when it is shipped to its destination, pays for it and later sells it to Smith for $11,000. The Blank Iron Company later brings suit against Brown for $1,000, his profit on the transaction. Upon hearing of this suit and learning the true facts, Smith sues the Blank Iron Company for $1,000. (a) Should the Blank Iron Company recover as against Brown? State reasons. Be brief. (b) Should Smith recover as against the Blank Iron Company? State reasons. Be brief. (c) Could Smith recover in a suit against Brown? State reasons. Be brief.

(a) Yes.

It is a fundamental rule that an agent employed to sell cannot be a purchaser, unless he is known by his principal to be such, nor is the rule relaxed where he was employed to sell at a fixed price and takes the goods at that price himself." (Peckham Iron Co. v. Harper, 41 O. S. 101).

"We think the law is well settled in the state that an agent employed to sell, can not purchase for himself either directly or indirectly, nor can he have any interest in the subject matter of the sale without his principal's consent. The law does not suffer one who is an agent of a vendor to have any interest in a contract of sale, or to earn any profit thereby outside of his regular compensation, unless it is done with the knowledge and consent of both principals. This rule of law we think is clearly stated in the care of Bell v. McConnell, 37 O. S., 396; and Peckham Iron Co. v. Harper, 41 O. S., 100." Pagel v. Creasy, 26 C. C. (N. S.) 113, at p. 117.

(b) No.

The Blank Iron Company has not failed in any obliga-

tion toward Smith and hence there are no grounds on which he may recover from the company.

Smith voluntarily bought for $11,000. The fact that the Iron company would have been willing to sell for (and authorized a sale for) less is no ground for an action. The company is entitled to get the best price obtainable.

(c) No.

The attempted fraud of the agent was on his principal, the Iron Co., not on Smith. It is proper for the agent to obtain from Smith the best price Smith will pay and it is nothing to Smith that the agent obtained that price with the intention of unlawfully keeping a part of it from the principal. The iron company's authorization to sell for $10,000 may be presumed to authorize a sale for that amount or more and the Iron Company (principal) ratifies the sale at $11,000 when it demands the $1,000 profit from its agent. This precludes Smith from suing the agent for misrepresenting his authority.

(5)

The Standard Oil Company erects a gasoline station at Daisyville, Ohio, and places Green in charge as agent. Green opens a bank account in his own name with the Savings Bank of Daisyville and deposits all receipts from the business. He also opens a bank account with the First National Bank of Daisyville and deposits all his personal funds in the latter. The Savings Bank of Daisyville fails and all deposits are wiped out. Can the Standard Oil Company recover from Green the amount of their loss?

State reasons. Be brief!

Yes.

If an agent deposits his principal's money in a bank in good standing either in his principal's name or under some mark to indicate that the deposit is not his own personal account, he will not be liable although the bank prove insolvent; but if he deposits it in his own name or in any manner other than to indicate that it belongs to his principal, ordinarily he is personally liable for any loss. 31 Cyc., page 1478, (f).

The relation between a bank and its depositor, is that of debtor and creditor. (Niles v. Olzak, 87 O. S. 229, 100 N. E. 820). (Coal Co. v. Obrien, 98 O. S. 14, 120 N. E. 214). (Deposit Co. v. Bank, 16 C. C. (N. S.) 320, 31 C. D. 516).

The relation between a bank and a depositor in its savings department, differs only from the relation of a general depositor in that presentation is required of the depositor of his pass book, when payment is demanded. (Bank v. Karas, 14 App. 147, 22 C. C. (N. S.) 33).

When the agent, Green, deposited the money of the Oil Company, in the savings bank under his own name, the bank held the money exclusively for him as its creditor and

there was a conversion by the agent of his master's money.

(6)

Jones is agent for Smith. In order to cover up a mistake made in connection with the business Jones signs Smith's name to a ninety day note. Brown accepts the note, knowing that Jones is agent for Smith. At the end of sixty days Jones absconds and Smith writes to Brown: "You can consider that note the same as if I had signed it myself." On the due date Brown demands payment from Smith. Smith refuses. Brown sues Smith on the note. Can Brown recover on the note? State reasons for your answer. Be brief.

No.

Altho Jones is agent, he had no authority to make this note and it is therefore, a forgery, and absolutely void.

A mere promise by a supposed maker to pay a forged note, without any new consideration, and without circumstances creating an estoppel against the promisor, does not become a binding contract creating a liability to pay such note.

The principle of agency by which a principal may ratify the unauthorized act of his agent does not apply to the alleged ratification of a forged note, the act of the agent being voidable, may be ratified; the act of the forger is void, and cannot be ratified. (Workman v. Wright, 33 O. S. 405).

There is no foundation for estoppel. Had Brown, the owner of the note, taken it upon the faith of Smith's admissions, or had he changed his status at all by reason thereof, such facts would create an estoppel; but all these statements, whatever they may have been were made after Brown became the owner of the paper. Brown did not act upon them at all; he was in no way prejudiced by them, nor did they induce him to do, or omit to do, anything whatever to his disadvantage. (Idem. at p. 407, Shinew v. First Nat. Bank, 84 O. S. 297, 95 N. E. 881).

(7)

A, one of the traveling salesmen of the Brown Shoe Company of Columbus, is taken suddenly ill in the course of his employment, and had to undergo an operation at a Cleveland hospital. Can the hospital collect its bill from the employer in the absence of a contract between the company and the salesman for medical attention to its employes? State reason briefly.

No.

It is not within the scope of the agent's authority to contract such a debt in the name of the principal and hence, the agent cannot bind the principal for such personal service rendered the agent.

"Liability of the principal is confined to acts done within the scope of his agency; for to that extent only does he undertake with the public; and beyond that, they have no right to confide in the agent. Hence it is incumbent on those who deal with agents, knowing them to be such, to ascertain the extent of their authority; whether it be general or special, express or implied; for beyond this authority, they cannot look to the principal." (Walker's American Law, p. 299).

(8)

A is the agent of the A. B. Company of Portsmouth, Ohio, and is duly authorized as such agent to sell the personal property of the company located at its branch office in Columbus. A exchanged the property of the said company with the Piggly Wiggly Company for a stock of merchandise. The A. B. Company refused to ratify the exchange. What are the rights of all parties?

The exchange was beyond the scope of the agent's authority. The A. B. Company may recover back its property. The Piggly Wiggly Company could recover from the agent for breach of warranty of authority.

"A power of an agent to sell does not include or imply a power to dispose of it by exchange, or barter. Persons dealing with such agents are bound to notice the extent of such powers and the principal will not be estopped to deny such assumed powers, and such contract of exchange is void for want of power in the agent to make it." (City of Cleveland v. State Bank, 16 O. S. 236. See also 140 U. S. 253).

Where an agent knowingly, negligently or mistakenly holds himself out, either expressly or impliedly, as having authority, to act for a principal in a particular transaction when in fact he has no such authority, he is liable to the third party who deals with him on the strength of such representation for any damage the latter may suffer in consequence of any change of his legal relations induced by the representation. (Huffcut on Agency, Chapter XV § 1831).

The liability of one contracting as agent without having in fact authority to do so, is founded upon his implied promise that he has authority to bind the principal. (Trust Company v. Floyd, 47 O. S. 525, 26 N. E. 110).

(9)

If the agency is one at will, it may be revoked at any time, except it be coupled with an interest. What does the phrase "a power coupled with an interest" mean?

The phrase "a power coupled with an interest" means that where an agreement is entered into on a sufficient consideration whereby an authority is given for the purpose

of securing some benefit to the person in whom the authority is vested, such authority is irrevocable. This is what is usually meant by a power coupled with an interest. (Swan's Treatise, p. 650).

A power coupled with an interest must be an interest in the thing itself, not an interest in that which is to be produced by the exercise of the power. In other words the power must be engrafted on an estate in the thing. (Villhaurer v. Toledo, 32 W. L. B. 154, 5 D. 8; Easton v. Ellis, 12 D. Repr. 32).

If the agent's interest is only a right to share the proceeds which result from the execution of the power, the agent has not a power coupled with an interest. (Idem.)

To constitute a power compled with an interest, there must be an interest in the thing itself, and not merely in the execution of the power. (Hunt v. Rousmanier's Admr's. 8 Wheaton (U. S.) 174).

(10)

Write a form of a power of attorney for A to sign B's name to checks for the payment of clerk hire.

Know all men by these presents, that I (B), residing at .....have made, constituted and appointed, and by these presents do make, constitute, and appoint A, my true and lawful attorney for me and in my name, place and stead, to draw checks from time to time, and sign my name to them for the purpose of payment of clerk hire on The ..... Bank of ....., Ohio, hereby ratifying and confirming all that my said attorney, shall lawfully do or cause to be done by virtue hereof.

In witness whereof, I have hereunto set my hand this .....day of ..... in the year one thounsand nine hundred and .....

Signed and acknowledged in the presence of

..... (B).....

..... signed

State of Ohio }
.....County } ss:

Before me, a , in and for said county, personally appeared the above named , who acknowledged that he (she) did sign the foregoing instrument and that the same is his (her) free act and deed.

In Testimony whereof, I have hereunto subscribed my name at ....., this .....day of....., 19.....

(Seal)

.....

(11)

An agent converts the subject of his trust or agency into money and pays the same out in discharge of his own

indebtedness to one ignorant of the agency. Can the payee hold the money as against the rights of the principal? Give reason for answer.

Yes.

In the present case, the payee can probably hold the money as against the rights of the principal, although the facts are somewhat meager.

The rule is: Where, in violation of his duty, an agent makes a payment or appropriation of his principal's money to a third person, the principal may recover from the third person the money so misapplied, unless the third person is a bona fide holder for value and without notice." (National Express Co. v. Hough, 3 N. P. 289, 3 D. 169).

In the present case, we do not know whether the third person was a bona fide purchaser or not. The statement that the third person (payee) was ignorant of the agency probably establishes that he took bona fide; and the discharge of the indebtedness makes him a purchaser for value. Further, "the burden of indentification is on the principal. As money has no "earmarks," he must, as against an innocent holder, be able to show that the money is his indentical fund, and impressed with some notice of that fact." (See 2 C. J. 882).

(12)

A acts as agent for B in buying real estate. A buys a piece of property with B's money and takes the deed in his own name. A sold the property at a profit of $1000. Can B make A account for the profit? Give reason for answer.

Yes.

The rule is that all profits made in the course of the business of the principal belong to the latter. It is a breach of good faith to the principal for an agent to so deal with the subject matter of the agency as to make a profit for himself in excess of his regular compensation; and if he does so, he can be held as a trustee, and may be compelled to account to the principal for such profits, whether in performance or violation of his duties. (Aetna Ins. Company v. Church, 21 O. S. 492; 2 C. J. 697).

The law does not permit one who is an agent of a vendor to have any interest in a contract of sale, or earn any profit thereby outside of his regular compensation, unless it is done with knowledge and consent of his principal. (Pagel v. Creasy, 26 C. C. (N. S.) 113, 27 C. D. 511).

(13)

D by letter requested and authorized E to make sale of a tract of land for him, and E in accordance with request and authority as expressed by the letter, made a con-

tract of sale and received part of the purchase money and gave possession of the land to F in accordance with the contract, shortly after the death of D but without knowledge of that event, and F afterwards paid the balance of the contract price to guardian of the heirs of D. Afterward the heirs of D brought an action to recover possession of the land, and F thereupon commenced suit against the heirs to enjoin their proceeding in such action:

(a) What were rights of parties? Give reasons. What is the general rule?—

(b) As to whether or not the death of the principal works an immediate revocation of the authority of the agent, and

(c) Whether or not any acts subsequently done or transactions entered into by the agent are binding on those claiming under or through the principal. Give any exceptions to general rule.

(a) F has the right to the possession of the land. Not knowing of the death of B, the authority of the agent was not revoked so far as his ability to contract for the sale of the land in the name of his principal (D) is concerned and the heirs in equity, must sign a deed to the buyer and failing to do so, the decree of the court will serve as a deed.

Since the act done by E was not one that had to be done in the name of the principal and both E and F acted in good faith, the heirs of D are estopped to deny the apparent authority of E, and the contract is binding on them. (Ish v. Crane, 8 O. S. 520).

A, owning a tract of wild land in a remote part of the state, by letter requested B, living near the land, to sell the same for him, at a price named in the letter. B, in accordance with the request, shortly after the death of A, but without notice of the event to either party, sold the land to C, at the price named, part paid in hand and the balance to be paid on receipt of a deed from A, and gave C possession of the land. C afterwards paid the balance of the purchase money to the guardian of the heirs of A, on demand thereof. C continued in possession and made permanent improvements on the land. Afterward the heirs of A brought an action to recover the land, and C thereupon commenced this suit against said heirs to enjoin their proceeding in such action. Held: That a bona fide transaction by an agent, not necessarily to be done in the name of the principal, as a deed, etc., but a matter in pais merely, done after the death of the principal, but in ignorance of the event, and within the scope of the agency, is, nevertheless valid and binding on the representatives of the principal. (13 O. S. 574 at p. 608).

(b) The general rule is that the death of the principal acts as a revocation of the existing agency by operation of

law. (Ish v. Crane, 8 O. S. 520, 13 O. S. 574 at p. 585).

(c) The general rule is that death revokes agency except where it is an agency coupled with an interest or with an obligation, or was given for a valuable consideration. (Mechem on Agency, 2nd Ed. Vol. 1. §§ 671, 672).

(14)

(a) Can a contract be enforced which provides that the agent should have exclusive sale of goods "as long as he gives us reasonable volume of business"? Give reasons.

(b) X, a real estate agent, agrees with Y who was the owner of a ¼ interest in certain real estate, to find a buyer for the whole property. X finds a buyer. Y cannot obtain the consent of other part-owners to sell.

(1) Can the agent recover his commission?

(2) Had part-owner any authority to employ an agent without the consent of other part-owners?

(a) No.

A contract of exclusive agency for the sale of goods so indefinite as to duration and quantity, that the court cannot ascertain the intention is void. Such is a contract "as long as he gives us the reasonable volume of business". It is too uncertain to be enforced. (Trent Milling Co. v. Wells-Abbott-Nieman Co., 10 App. 297).

(b) (1) X can recover his commission. "A real estate broker who undertook to procure for a property owner "a purchaser who would be ready, willing, and able to buy" the property in question at a specified rate is entitled to his commission upon producing such a purchaser, notwithstanding the sale failed through inability of the party with whom he contracted to give title.

The broker in such case has a right to rely on the presumption that the party contracting with him will be able to perform his part of the contract and furnish title to a prospective purchaser." (Thos. Jamison v. Richard Harrison, 29 O. C. A. 481, 10 App. 454).

(2) No.

The part-owner has no authority to employ an agent to sell the land of the others without their consent.

Where several persons having common interests desire to be represented by an agent it is, in general, true that one of such persons has no implied power to appoint an agent for all and that all must unite in making the appointment. Each may appoint for himself or all unitedly may appoint for all, but one has no implied power to appoint for another or for all.

In the case of co-tenants, there is no implied authority in each to act for all so as to bind them personally, and the act of one or the appointment of an agent by one will, therefore, bind that one only. (10 App. 454 at p. 456-7).

(15)

(a) Has principal the right to assume, until otherwise advised, that his agent will act within the scope of his authority?

(b) Does a duty rest on the principal to make any effort to discover whether the agent is doing unauthorized acts?

(c) Is knowledge imputed to the principal by reason of the fact that he had resonable opportunity to acquire such knowledge?

(a) A principal has the right to assume that his agent will act within the scope of his authority. In case that the agent acts beyond the scope of his authority, the principal is not bound by such acts, the rule being that, "An agent cannot establish his own authority either by his representations or by assuming to exercise it. An assumption of authority to act as agent for another of itself challenges inquiry. Persons dealing with an assumed agent, whether the assumed agency be a general or special one, are bound at their peril, if they would hold the principal, to ascertain not only the fact of the agency but the nature and extent of the authority." (See Mechem on Agency, 2nd Ed., § 743).

(b) No.

Altho a principal may in some cases, as e. g. the issuance of stock certificates, (56 O. S. 351), be charged with a duty to supervise his agents, generally no duty rests on the principal to discover whether the agent is doing unauthorized acts. Third persons dealing with such agent are bound to ascertain the extent of the agency. The law indulges in no bare presumption that an agency exists. (Idem.)

(c) No.

Knowledge that an agent is doing unauthorized acts is not imputed to the principal merely because he had reasonable opportunity to acquire such knowledge. Mechem at § 720 says: "Apparent authority is not founded in the negligence of the principal, but in the conscious permission of acts beyond the powers granted." The rule that the principal is not bound by the unauthorized acts of the agent is not changed by the fact that the principal had knowledge of such unauthorized acts, unless there are facts sufficient to constitute an estoppel.

If the examiner had in mind the question of, whether knowledge of the agent may be imputed to the principal by reason of the fact that he had reasonable opportunity to acquire such knowledge; then the answer is still, "No". It is true that knowledge of an agent is imputed to the principal in all cases in which the agent acquired such knowledge while acting within the scope of his employment and which is material to such agency. (Myres v. John Hancock

Ins. Co., 108 O. S. 175, 140 N. E. 504).

But the opportunity to acquire such knowledge, whether reasonable or not is immaterial since the agent is said to be the alter ego of the principal, and their identity is one in contemplation of law. (Mechem on Agency, § 1805).

(16)

(a) When or under what conditions may an agent invest the funds of his principal?

(b) An agent of a county officer illegally loaned the public money or funds. Is the county precluded from suing for and recovering the same?

(c) If a suit is brought, is that an adoption or satisfacion of such illegal transactions?

(a) An agent may invest the funds of his principal when such is within the express authority of such agent or which may be implied from custom or the character of his duties. Such authority is also given when the principal ratifies the act of the agent.

(b) No.

G. C. § 19 provides that "the state, a county, township, municipal corporation or school board, shall not be precluded by the illegal loan or deposit by an officer or agent of public money, funds, bonds, securities or assets belonging to it, from suing for and recovering the same."

(c) No.

Such statute (G. C. § 19) says such suit shall not be held to be an adoption or satisfaction of such illegal transaction.

(17)

(a) Under what conditions or circumstances may an agent represent both contracting parties?

(b) Can an agent dealing with the subject-matter of his agency enter into a contract with himself in respect thereto that will bind his principal?

(c) Can an agent enlarge his own authority by an unauthorized representation as to its extent?

(a) An agent may represent both parties when both parties being fully informed of all the facts consent to such agency. (Bell v. McConnell, 37 O. S. 396).

The law will not permit the agent to put himself in such a situation that his own interests will conflict with those of the principal. The latter is entitled to the disinterested skill, diligence and zeal of the agent for his own exclusive benefit, and unless the principal knowingly consents to it, the agent cannot divide this duty and give a part to another. Hence it is the rule of the law that, except with the free and intelligent consent of his principal, given after full knowledge of all of the circumstances, the agent cannot

in the same transaction act both for the principal and adverse party. (Mechem Agency, Vol. 1, § 1590).

(b) No.

An agent can never make profit at the expense of his principal or take any personal advantage of his position as agent. Such conduct is a breach of fiduciary relationship existing between principal and agent. (James Mitchell v. Wm. Dunlap, 10 O. 117).

Public policy requires that an agent shall not deal with or for himself, directly or indirectly, and renders contracts so made voidable as against his principal. This principle is applicable alike to private agents and public officials who are the agents of the public, and the latter will not be permitted to put themselves in a position antagonistic to the public interests which they represent and which it is their duty to protect. (State v. Penney, 13 D. 210).

(c) No.

In the absence of ratification and estoppel, the principal, cannot be bound by an unauthorized representation, made by the agent, whereby he assumes to enlarge his authority. Otherwise it would be immaterial whether an agent was authorized to do an act for his principal or not so long as he (the agent) represented that he had authority to act in that respect. (Bradford Belting Co. v. Gibson 68 O. S. 442 at p. 448, 67 N. E. 888, 21 R. C. L., § 34, p. 856, Mechem on Agency, § 743, p. 527).

(18)

(a) May a person laboring under any legal incapacity be an agent for any purpose?

(b) May a wife act as agent for her husband?

(c) May an infant act as agent?

(d) If a principal knowingly appoints an insane person as his agent, will principal be liable for acts of agent?

(a) Yes.

Inasmuch as it is the principal who is to be brought into contractual relations with third persons, it is obvious that the question of his capacity is more important than that of the agent. The agent acts in a representative capacity and exercises a derivative authority. A less degree of competency is therefore required in the agent, than in the principal, and it is said that any person may be an agent, except a lunatic, imbecile or child of tender years. Hence, infants, married women, slaves and aliens have been held competent to act as agents. (Mechem's Outlines of Agency, p. 27).

(b) Yes. "Both at Common Law and under the modern statutes the wife may be the agent of her husband." (Mechem on Agency, 2nd Ed., § 161. See also Toledo v. Duffy, 13 C. C. 482, at p. 484; 7 C. D. 113; 21 R. C. L., p. 819, § 4).

(c) Yes, if he is not of too tender years. (See 2 C. J. p. 430, § 22; 21 R. C. L., p. 819, § 4).

(d) Yes.

Generally speaking the principal will not be heard to complain of the lack of mental capacity of one whom he has chosen to represent him. (2 C. J., p. 430, § 22.)

If the principal knowingly appoints any insane person as his agent, or permits him after knowledge of the insanity to act as agent he will not be excused by reason of it. Idem (foot note)

(19)

H had a lot of hogs to sell. R representing himself to be the agent of L, bought the hogs for L on credit. H knew L to be responsible and would not have let R have the hogs on his own account. H relying on R's representations, thought he was the agent of L. R was not the agent of L and had no authority to buy hogs on L's account. R drove the hogs away from H's farm and sold them to L, who was ignorant of the fraud and paid full value to R for the same. Shortly thereafter H demanded of L payment for the hogs which was refused. Thereupon H sued L.

Can H recover of L? Explain your answer.

Yes.

Hamet v. Letcher, (37 O. S. 356) is as follows: "H the owner of chattels, relying on the representations of R, that he was agent of L, agreed to sell the same to L on credit, and H in the belief that R was such agent, delivered the chattels to him, when in fact he was not such agent, nor had he authority to purchase for L, as he well knew; Held—that the property in the chattels did not pass from H, and that L, who bought the chattels of R, and converted them to his own use, without the knowledge of the fraud, was liable to H for their value, and the fact that R at the time the chattels were delivered to him, paid a part of the price agreed on, will make no difference, except as to the amount of recovery against L.

H did not agree to sell to any other than L; who never agreed to buy of him, and he was induced to sell solely by reason of R's representation that he was such agent, which was wholly false, as R well knew. This, therefore, was not merely a voidable contract, but an agreement wholly void; and, under the circumstances, the property in the hogs never passed from H. Hence, applying the maxim that no one can transfer a greater right or better title than he himself possesses, it necessarily follows that L is liable as for a conversion. (37 O. S. 356 at 359).

(20)

X owned and operated a store where he sold new and second-hand musical instruments. B delivered at X's

store a second-hand piano and authorized him to sell it for $500, but directed that the buyer was to pay the money directly to B. X displayed the piano in his store along with his own goods. M, believing X to be the owner of the piano, bought it from X for $400 and paid him cash. X took this money and some other money from similar transactions and disappeared. An investigation developed that he was hopelessly insolvent.

B. brought suit against M to replevin the piano.

Can he get it? Explain your answer.

No, "where an owner of personalty puts the same in the possession and control of his agent to be sold by him, and he sells it to a third person under an agreement where the latter pays partly in cash for said personalty, and the purchaser has no knowledge of fact of such agency, but believing and having reasonable ground to believe, the agent to be the absolute owner of such personalty, such contract of sale is valid and binding as against the real owner and cannot be repudiated by him. (6 C. D. 59, 9 C. C. 107.)

Here the principal has put the property into the hands of his agent, and authorized him to dispose of it. He thereby gives the dealer indicia of ownership, and this would estop him from setting up his title as against an innocent purchaser. He does not in anyway make known to the world, or to this particular purchaser, that he is the owner of the property, and the person in whose possession the property is, is only his agent. He thus holds himself out to the world as absolute owner, and why may not a person ignorant of the true relationship between them, deal with him as such owner? It would seem to be too late to cry out after an innocent person has put himself in the relation of a purchaser of the property, and paid a large sum in cash for it. G. C. § 8360 provides that factors and agents entrusted with the possession of merchandise for the purpose of sale, shall be deemed to be the true owner thereof, so far as to give validity to any contract made by such agent with any other person for the sale or disposition of the merchandise.

(21)

Johnson went with Wolf to the First National Bank of Toledo for the purpose of identifying him and while there Wolf presented a check. The cashier of the bank asked Johnson to endorse it, which he refused to do; but upon the cashier's statement to him that he only desired his name for the purpose of showing who identified Wolf, and that he would not be held liable on the check if he endorsed it, Johnson signed his name on the back of the check. The check was not paid and went to protest.

The bank sued Johnson. Can it recover? Why?

The bank cannot recover.

While it is true that the cashier of a bank has no general authority to tell a person that he would not be liable and his knowledge would not bind the bank ordinarily, yet the bank cannot have the benefit of the contract gained by the cashier's declarations, without taking its burden as well. (Mechem on Agency, § 446).

A blank endorsement by a party to the paper is a written contract, the terms of which are supplied by the law, and cannot be varied by parol, unless made between parties having notice of them. (Daniel's Negotiable Inst., 707).

A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicated by appropriate words his intention to be bound in some other capacity. (G. C. § 8168).

But in the present case parol evidence is admissible because it is between the parties and the party did indicate his intention by appropriate words—whose only vice is that they are oral.

(22)

The Belting Company, an Ohio corporation made a written contract with G whereby G agreed to erect a factory building on a lot in Cincinnati according to plans and specifications therefor, and the Belting Company agreed to lease the building for 25 years at a stipulated annual rental. G proceeded to carry out the agreement and started work on the building. While the work was going on, R the secretary of the Belting Company, called at G's office and told him that his company would not lease the building and would not carry out the contract, and further stated to him that he was authorized by the directors of his company to make this statement. As a matter of fact the directors had never given R such authority. G quit work on the building and sued for $10,000 which was his actual loss.

Can he recover? Explain answer.

No.

"The corporate powers, business, and control of an Ohio corporation are required by G. C. § 8660, to be exercised, conducted and controlled primarily by its board of directors; and prima facie the corporate power of making, or of refusing to perform contracts on behalf of the corporation rests in the board of directors. In the absence of express authority conferred upon its officers, or agents, and of such a course of dealing with the world as clearly implies authority to do the controverted act, a corporation can be bound only by its board of directors. An agent cannot enlarge his own authority by an unauthorized representation as to its extent; and proof of the statement by the secretary of a corporation that the corporation would not perform a con-

tract and that he was authorized by the directors and stockholders to so state, is not competent evidence to bind the corporation, without otherwise showing authority from the corporation, to the secretary to make such statement in behalf of the corporation. (Bradford Belting Company v. Gibson, 68 O. S. 442, 67 N. E. 888).

(23)

On May 1, 1918, J entered into a written contract with H to produce a purchaser ready, willing, and able to buy at the rate of $175 per acre certain real estate in which H had an unlivided ¼ interest. H agreed to pay J for his services $2000. On June 15, 1918, while the contract was in force, J procured a purchaser for said real estate, ready, able and willing to buy the same at the rate of $175 per acre. J notified H that such a purchase had been procured, but H failed and neglected to contract with the purchaser for the sale of the land.

J sued H for his commission. Can he recover?

Yes.

A real estate broker who undertook to procure for a property owner "a purchaser who would be ready, willing and able to buy" the property in question at a specified rate, is entitled to his commission upon producing such a purchaser notwithstanding the sale failed through inability of the party with whom he contracted to give title.

The broker in such case has a right to rely on the presumption that the party contracting with him will be able to perform his part of the contract and furnish title to a prospective purchaser. (Thomas Jameson v. Richard Harrison, Jr., 29 O. C. A. 481, 10 App. 454).

(24)

Samuel Shoup was the agent of the International Company. He drew a postdated negotiable check on the 4th National Bank of Cincinnati and signed it "Samuel Shoup, Agent." The party to whom the check was delivered negotiated it to M. H. Anderson for a valuable consideration before the day of its date. The check was not paid when presented and was protested. Anderson sued the International Company.

Can he maintain an action? Explain your answer.

No.

Where an agent drew a post-dated negotiable check on a bank, and signed it with his own name, adding thereto the word "agent" but without indicating thereon, the name of the principal, and the party to whom such check was delivered negotiated it to a third party, for a valuable consideration before the day of its date; Held, that the principal is not bound thereon and no action can be brought

against him. When an ordinary simple contract is signed by an agent in his own name, with the addition of agent thereto, the principal may be made liable thereon. But this rule does not apply to commercial paper. No one but one who appears on face of a bill or note to be a party to it, can be bound by it. Here the word "agent" was merely descriptio personae. (Anderson v. Shoup, 17 O. S. 125).

(25)

A, as principal, authorizes B, as agent, to buy a tract of land from C, at a price of ten thousand dollars. B, unable to buy at that figure, contracts to pay eleven thousand dollars for the property. Information reaching A of the nature of the contract, he ratifies and pays C the eleven thousand dollars, but refuses to pay B his compensation for services which it had originally been agreed should be one thousand dollars. B sues A. Who shall prevail? On what principle of law?

B shall prevail.

While it is the duty of the agent to obey the instructions of his principal; and if he disobeys them without sufficient excuse, he is liable to the principal for any loss which he may thereby sustain; yet the effect of the notification is to release the agent from all liability to the principal for acting without authority; and to give the agent the same rights against the principal for compensation and reimbursement, which he would have had if the act had been previously authorized.

By the doctrine of relation, ratification invests both principal and agent, as a rule, with the same rights and duties as if the transaction had been previously authorized. If the principal elects to ratify, he assumes the burdens that are incidental to adoption of the agent's act. Hence the agent may look to the principal for compensation and indemnity. Where a real estate agent departs from his authority in effecting a sale, upon ratification the compensation fixed in the original contract of employment controls. Tiffany on Agency, Second Ed., (1924), p. 169, § 64.

(26)

X, owner of real estate, authorizes Y, his agent, to sell his farm for $5000 provided $2500 is paid as first payment. Y finds a buyer to whom he agrees to sell the property for his principal, but the purchaser makes payment to Y only of $1500 and is unable to make payment of the additional $1000 cash payment. X refuses to ratify and declines to accept the money. Thereupon Y, the agent, instead of returning the $1500 to the prospective purchaser, appropriates it to his own use. Is Y guilty of embezzlement? If not, of what crime or crimes is he guilty, if any?

Y is not guilty of embezzlement for the reason that he did not receive the money as the agent of the purchaser, and X for whom he presumed to act, refused to ratify the agency. Consequently Y was in reality agent for neither party and could not be convicted of a crime in which agency is an essential factor.

On a similar set of facts the court stated that it had grave doubts whether the defendant was guilty of any criminality whatsoever. Ottke v. State, 17 C.C.(N.S.) 390, 32 C.D. 197.

(27)

Jones, a traveling salesman, contracted with Smith, a wholesale dealer in millinery goods, to give his exclusive time to his principal's business. However, as a side line, he sold while on the road, dress goods, etc., to his principal's customers, making a profit thereon. Smith, obtaining knowledge of the fact, sued Jones seeking to recover all the profits made in the dress goods transaction. Who should prevail, and why?

Smith should prevail.

The agency was such that the entire time of the agent was to be devoted to the business of his principal. From the facts it appears that the profits may also be said to have arisen indirectly from the course of defendant's employment. An agent will not be permitted to reap a secret benefit at the expense of his principal by dealing directly or indirectly in the business of the agency for his own profit, nor to place himself in a position antagonistic to his principal and then retain any benefit which he was able to obtain at the expense of his employer. Sprigg v. Irwin, 8 D. 668; Aetna Ins. Co. v. Church, 21 O.S. 492.

(28)

Can the relation of principal and agency be established by estoppel? Give illustration.

Yes.

Whenever a person has held out another as his agent authorized to act for him in a given capacity; or has knowingly and without dissent permitted such other to act as his agent in that capacity; or when his habits and course of dealing have been such as to reasonably warrant the presumption that such other was his agent authorized to act in that capacity; he will not be permitted to deny that such other was his agent authorized to do the act he assumed to do, provided that such act was within the real or apparent scope of the presumed authority.

A corporation engaged in the business of storing goods for hire is bound by a stipulation to effect insurance on goods stored with it, the stipulation being incident to a con-

tract of bailment executed in its name by an agent who, though without express authority to stipulate to insure, is by it held out to the public as authorized to make contracts for storage in the conduct of its business, the bailor acting in good faith and without notice of any limitation upon the agent's authority. General Cartage & Storage Co. v. Cox, 74 O.S. 284.

(29)

Can a minor act in the capacity of an agent? What is the rule as to minor's liability for the acts of his agent?

Yes.

Though an infant may be an agent, the relation is an imperfect one. The infant agent may bind his principal, but neither the principal nor third persons with whom the agent deals can acquire the same rights against the infant agent which they might have if he were an adult.

An infant cannot appoint an agent, and such appointment is void according to early authority. The better rule, however, is that the appointment is simply voidable, like the infant's ordinary contracts, and that as to those matters, like the purchase of necessaries, concerning which the infant could act in person, he may act by agent. See Sheldon's Lessee v. Oren Newton, 3 O.S. 494, 507, 508. Lessee of Lawrence v. McAster, 10 O. 37.

(30)

(a) What is meant by agency coupled with an interest?

(b) How does death of principal affect it?

(c) Is such an agency subject to revocation?

(a) An agency coupled with an interest is one in which the agent has an interest in the thing itself, and not an interest in that which is to be produced by the exercise of the power. The interest must be an interest in the thing itself which is the subject of the power, and not in the proceeds or avails of such thing. Easton v. Ellis, 12 D. Repr. 32, 35; Villhauer v. Toledo, 5 D. 8, 32 B. 154; Hunt v. Rousmanier, 8 (Wheat) (U.S.) 174, 203.

(b) Death does not affect it.

The general rule that a power ceases with the life of the person giving it admits of one exception. If a power be coupled with an interest, it survives the person giving it, and may be executed after his death. Easton v. Ellis, 12 D. Repr. 32, 35.

(c) Authority coupled with an interest is absolutely non-terminable, except by natural expiration. Tiffany on Agency, Second Ed., p. 237, § 88.

(31)

A, aged 18 years, lived in the country some distance from the city. He appointed B, his neighbor, who was going to the city, his agent to purchase for him a much needed suit of clothes and overcoat and also a radio receiving set. A agreed to pay B for his services a commission of five per cent of the purchase price of the goods. B carried out his commissions, purchasing the clothing from X and the radio receiving set from Y. B told X and Y that he was purchasing for A who would pay for them in ten days. The goods were all delivered to A, who accepted them. Thereafter X and Y presented their bills to A, and B presented his bill for services. A refused to pay any of them. Is A liable for any of the bills, and if so, why? If not, why?

A is liable to X for the reasonable value of the clothing, but is not liable to Y and B. It is a well established principle of law that the appointment of an agent by a minor is not void but voidable, like the infants ordinary contracts, and as to those matters, such as the purchase of necessities, concerning which the infant could act in person, he may act by agent.

G.C. § 8382, provides: * * * When necessaries are sold and delivered to an infant, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor. Necessaries in this section mean goods suitable to the station in life of such infant or other person, and to his actual requirements at the time of delivery.

Except for necessaries, the law grants to infants immunity from liability on their contracts. This immunity is intended for their protection against imposition and imprudence, and is continued after majority as a mere personal privilege. Harner v. Dipple, 31 O.S. 73.

(32)

B, who was agent for Y & Co. for the sale of guards on wood working machinery, entered the employ of X & Co., a large manufacturer of woodenware, as superintendent of their factory. While so employed he ordered a number of guards from Y & Co. at the regular price and was allowed his commission of $10 on each guard, the agreement for such commission being unknown to X & Co. As soon as X & Co. learned of such agreement they discharged B, notified Y & Co. that they disavowed the contract made by B on the ground of fraud in making the same, offered to return the guards in the same condition as received, and demanded back the money which had been paid under the contract. Is X & Co. entitled to rescind the contract? Reasons for answer.

Yes.

One B, who was an agent of P & S, for the sale of automatic separators, manufactured by them for use on natural gas wells, entered the employ of the board of gas trustees of the city of F., as superintendent of the natural gas works managed by them for said city. While in the employ of said board he ordered, in its name, from P & S, thirty-two separators, upon the sale of each of which P & S allowed him a commission of $10, the agreement for such commission being unknown to the board of gas trustees. As soon as the board learned of such agreement, they discharged B, notified P & S that they disavowed the contract made by B, on the ground of fraud in making the same, offered to return the separators, and demanded back the money which had been paid under the contract. HELD, That the conduct of B, in acting as agent for both parties, without the knowledge of the board of trustees and of P & S, in procuring the contract through such agency, was fraudulent and entitled the city to rescind the contract. Findlay v. Pertz, 9 O.F.D. 30; 66 Fed. 427.

(33)

Holt negotiated an exchange of lands between Cole and Dow. Holt acted as agent of both Cole and Dow with the consent of Cole, but Dow did not know that Holt was acting as agent for Cole. Holt sued Cole for his commission. Is he entitled to recover? Give reasons for answer.

No.

The double agency of a real estate broker, who assumes to act for both parties to an exchange of lands, involes, PRIMA FACIE, inconsistent duties; and he cannot recover compensation from either party, even upon an express promise, until it is clearly shown that each principal had full knowledge of all the circumstances connected with his employment by the other which would naturally affect his action, and had assented to the double employment. But when such knowledge and consent are shown, he may recover from either party. Bell v. McConnell, 37 O.S. 396.

In law, as in morals, it may be stated that, as a principle, no servant can serve two masters, for either he will hate the one and love the other, or else he will hold to the one and despise the other. Luke, 16, 13.

(34)

Colby was a dealer in wool at Marion, Ohio. He authorized Roberts, a broker in Boston, to sell for him a carload of wool. Roberts contracted in his own name to sell the carload to Hobbes, who had no knowledge that Roberts was not the real owner, but dealt with him as such. Roberts notified Colby that he had sold for him and gave shipping directions. Colby, without any knowledge that the broker had contracted in his own name, shipped the wool to

Hobbes. Hobbes paid Roberts for the wool immediately on delivery. Can Colby recover from Hobbes? Give reason for answer.

Yes.

The broker has not the possession of the goods and so the vendee cannot be deceived by that circumstance; and besides, the employing of a person to sell goods as a broker does not authorize him to sell in his own name. If, therefore, he sells in his own name he acts beyond the scope of his authority, and his principal is not bound. But it is said that by these means the broker would be enabled by his principal to deceive innocent persons. The answer, however, is obvious, that he cannot do so unless the principal delivers over to him the possession and INDICIA of property. Crosby v. Hill, 39 O.S. 100, 103.

(35)

A was sued for damages resulting from injuries received by falling into a trench which had been negligently constructed under A's supervision and direction. A answered that he had no interest whatever in the trench and that in superintending and directing its construction he had acted only and solely as agent for B & Co. A demurrer is filed to the answer. Should the demurrer be sustained or overruled? Give reasons.

The demurrer should be overruled.

If A contract with B to do the carpenter-work of a building, at a fixed price, and to superintend the other work on the building, employing the hands and certifying their bills to B, who pays them, and A is guilty of negligence in not sufficiently guarding a pit or vault, opened in the sidewalk of the premises on which the building is erected, B will be responsible for damage sustained by a person falling into the opening, in consequence of such negligence. Had the negligence been that of the carpenters, working under A, the rule of responsibility might have been different. Louis Samyn v. Patrick McClosky, 2 O.S. 536.

In the Opinion, at page 538, it is said: The so-called possession of A was as the agent of B merely, or, rather, he occupied the premises as mechanics usually do when making improvements. Dignifying a mere license thus to occupy, by calling it a surrender of possession, will not serve to avoid responsibility.

(36)

A appointed B his agent to purchase five carloads of coal. B having secured a very low price from X purchased ten carloads and notified A of the purchase. A told B he had only authorized the purchase of five carloads; also wrote X saying he would take the ten carloads but asking an extension of 30 days time for payment, which was granted.

A refused to pay B his commission on the ten carloads. Is A liable to B for commissions, and if so, to what extent, and why?

A is liable to B for commission on the ten carloads. Ratification cannot be partial, but must be of the entire transaction or none of it. Benefits cannot be retained and burdens repudiated. Workman v. Wright, 33 O.S. 405; Mechem on Agency § 116.

(37)

(a) What do you understand by the term principal and agent?

(b) State how the relation generally arises.

(a) A person who authorizes another to act on his behalf is called the "principal," and the person so authorized is called the "agent." Bouvier's Law Dictionary, Baldwin's Revision.

(b) The relation may be formed in four distinct ways:

1. **Agreement;**
2. **By estoppel;**
3. **By ratification;**
4. **By necessity.**

Huffcut on Agency, p. 23, § 9.

(38)

(a) What effect does the death of the principal ordinarily have upon the agency?

(b) Can the principal at any time terminate the agency?

(c) Can an agent delegate his authority?

(a) The death of the principal operates to instantly terminate an agency, not coupled with an interest. "The interest which can protect a power after the death of the person by whom it was contracted must be an interest in the thing itself. The power must be ingrafted upon some estate or interest in the thing to which it relates." McDonald v. Adm's of Black, 20 O. 185; Wheeler v. Knaggs, 8 O. 169.

(b) Yes.

Either the principal or the agent may in general dissolve the agency; the principal may discharge the agent, or the agent may repudiate the agency and refuse the exercise of its powers conferred. Hitchcock v. Kelley, 18 C.C. 808, 4 C.D. 180.

(c) It is the general rule, finding expression in the familiar maxim, (Delegatus non potest delegari), that an agent cannot delegate his authority to a sub-agent, without the express or implied consent of his principal. This is always the rule where the act to be performed requires the exercise of judgment or discretion, or where the principal evidently trusted to a personal performance by the agent.

Mechem on Agency § 100, Babcock v. Pavey, 8 O.S. 270; Pendall v. Rench, 2 O.F.D. 531.

(39)

A had a horse for sale. B, representing himself to be the agent for C, bought the horse on credit. A knew C to be financially responsible and would not have let B have the horse on his own account. A, relying upon B's representations, thought the latter was the agent of C. B was not such an agent and had no authority to buy the horse for C. B drove the horse away and sold it to C, who was ignorant of the fraud and who paid B full value for it. A demanded of C payment for the horse, which payment the latter refused to make. Thereupon A sued C. Can he recover? Give reasons for your answer.

Yes.

The title to the horse did not pass to B, the fraud voiding the contract with A; and C, the purchaser from B, could get no better title than B had. C is therefore liable to A for the horse or its equivalent. In a similar case, H, the owner of chattels, relying on the representations of R that he was the agent of L, agreed to sell the same to L on credit, and H, in the belief that R was such agent, delivered the chattels to him, when in fact he was not such agent, nor had he authority to purchase for L, as he well knew,—HELD, that the property in the chattels did not pass from H, and that L, who bought the chattels of R and converted them to his own use, without knowledge of the fraud, was liable to H for their value; and the fact that R, at the time the chattels were delivered to him, paid H part of the price agreed on, will make no difference, except as to the amount of recovery against L. Hamet v. Letcher, 37 O.S. 356.

(40)

When and under what circumstances is a principal bound by the acts of his agent?

It may be stated as a general rule that where the relation of agency legally exists the principal will be liable to third persons for all acts committed by the agent in his behalf in the course and within the actual or apparent scope of his agency, although some of the acts are to the principal's advantage and some to his disadvantage, and although they are done in disobedience of positive but private instructions; or where, if not duly authorized, they are not subsequently ratified by the principal with the full knowledge of the circumstances of the case. But in the absence of ratification or estoppel he is not liable for acts of the agent not within the scope of his authority. 2 C.J., p. 832, § 513-I.

(41)

A, having executed in due form a deed of gift of real estate to his son, said to B "Take this deed and keep it. If I get well I will call for it. If I don't, give it to Billy," the grantee. A was then ill and died within a few days thereafter of the same illness, and B then handed the deed to the grantee who caused it to be recorded. In this transaction, was B the agent of A, or of the grantee? Was this instrument valid as a deed? Give reasons.

B was the agent of A.

No.

In order to perfect a gift there must be a delivery of the res and in the present case there was none, as B merely acted as agent for A. Gifts causa mortis are not favored by the courts. Flanders v. Blanky, 48 O.S. 108, 113.

This was not a valid delivery, and hence the instrument never took effect as a deed. B was the agent of the grantor and not of the grantee, and hence the instrument was not only revocable by the grantor at any time before his death, but not having parted with all dominion over it during life, it became, on his death, a mere nullity. Williams v. Schatz, 42 O.S. 47, 50.

(42)

The Black Oil Company has an office at 249 Ajax Building, Cleveland, Ohio. John White opens an office next door at 250 Ajax Bldg., and paints this sign on the door:

"The Black Oil Co.,
John White, Agent."

Employes of the Black Oil Co. notice the sign on White's window and notify the president and secretary of the Black Oil Co., who do nothing about the matter and White continues to use the office and keep the sign on the door and for six months tells people that he is an agent of the Black Oil Co. White finally buys a typewriter and signs the order "The Black Oil Co., per John White, Agent." White requests the delivery of the typewriter and the credit manager of the typewriter company calls up several people in the oil business to ascertain if White is the authorized agent of the Black Oil Co. All the persons called advise the typewriter company tha they have bought oil from White for six months and that he never did business individually but always represented himself to be an agent of the Black Oil Co. Thereupon the typewriter company delivers the typewriter to 250 Ajax Bldg. and White receives the same and signs the receipt "The Black Oil Co., John White, Agent." The typewriter is not paid for and shortly after receipt of it, White leaves for parts unknown with the typewriter. It develops that White was a fake and had no connection with the Black Oil Co. The typewriter company demands payment from the Black Oil Co.,

which is refused. Can the typewriter company prevail against the Black Oil Co., in a suit for the value of the typewriter? State reasons. Be brief!

No.

Relation of principal and agent is not created by lack of care—even ordinary care—on part of alleged principal in preventing one who claimed to be his agent from holding himself out as such. Banon v. Tile Co., 9 N.P.(N.S.) 465, 20 D. 248.

An agency can be created only by the will of the principal, or by operation of law, and one who, having no principal, assumes to act as agent, is to be treated as the principal. Kelley v. Kelley, 12 O.F.D. 31.

(43)

Can an agent compel his principal to pay a commission for the agent's unauthorized sale, later ratified by the principal? State reasons. Be brief!

Yes.

Even in the absence of an agreement by the principal to compensate his agent, the agent has nevertheless a right to recover the reasonable value of the services rendered on quantum meruit, and this rule is not changed by the fact that the agency is by ratification. Benefits cannot be retained and burdens repudiated.

Where the contract so made by an agent is in excess of his authority, the principal cannot adopt it in part without adopting it in whole; and if he adopt it as to the contractee, he adopts it also as to the agent. Winpenny v. French, 18 O.S. 470.

(44)

The Red Iron Co. employs Jones as agent to sell pig iron. By the terms of the written contract of agency Jones is authorized "to sell to anyone, anywhere" pig iron at $50 per ton delivered at Columbus. Jones, after selling some of the iron on the open market, sees a shortage of pig iron coming and decides to buy a large quantity, quit the Red Iron Co. and re-sell the iron at a profit. Jones' contract provides that he may quit upon ten days written notice. On January 1, 1927, he gives written notice of his intention to quit the company. Between Jan. 1, 1927 and Jan. 10, 1927, Jones orders 50,000 tons of pig iron delivered to the Blank Iron Co., Columbus, Ohio. There is no such company, but Jones has made arrangements with the railroad company to receive the iron for him under the name of the Blank Iron Co. Before Jan. 10, 1927, 40,000 tons are delivered and paid for by Jones secretly. On Jan. 20, 1927, after Jones has left the employ of the Red Iron Co., the true facts are discovered. Jones still has the 40,000 tons and demands delivery of the balance.

(a) Can Jones compel the delivery? State reasons.

(b) The Red Iron Co. starts a replevin action against Jones for the return of the pig iron. Who should prevail? State reasons. Be brief!

(a) No.

(b) The Red Iron Co.

It is a fundamental rule, that an agent employed to sell cannot be a purchaser, unless he is known to his principal to be such; nor is the rule inapplicable or relaxed when the employment is to sell at a fixed price. The law will not suffer one to earn a profit, or expose him to the temptation of a dereliction of his duty, by allowing him to act at the same time, in the double capacity of agent and purchaser. It is a rule which applies universally to all who come within its principle, which principle is, that no party can be permitted to purchase an interest in property and hold it for his own benefit, when he has a duty to perform in relation to such property, which is inconsistent with the character of a purchaser on his own account and for his individual use. Peckham Iron Co. v. Harper, 41 O.S. 100, 108, 109.

The possession of specific personal property may be recovered in an action of replevin. G.C. § 12051.

(45)

Smith engaged Blackstone, an Ohio attorney, to collect a claim against the Street Railway Co. By written contract Smith agreed to pay Blackstone fifty per cent of all money recovered. Blackstone filed suit and the day before trial day Smith died and the case was continued for a month. Smith's administrator, immediately after his appointment by probate court, notified Blackstone that the contract with Smith would not be recognized and that Blackstone was discharged as attorney in the case. Blackstone refuses to withdraw and claims he has a contract coupled with an interest. Is Blackstone's contention correct? State reasons. Be brief!

No.

A contract between a client and his attorney to the effect that the attorney shall receive as compensation for his services a certain percentage of the sum recovered, does not create such an interest as will prevent the death of the client from operating as a revocation of the attorney's authority. Villhauer v. Toledo, 5 D. 8, 32 B. 154.

While it is true that agency coupled with an interest survives the death of the principal, yet where the interest of the agent is only in that which is produced by the exercise of the power, and no interest in the thing itself upon which the power is to be exercised, his authority ceases upon the death of his principal. Swan's Treatise, p. 350.

(46)

Johnson hired Peck to sell the Johnson farm at a figure "not less than $105 per acre" and also authorized Peck to sign a sales contract to any solvent prospective purchaser. Thereafter Peck entered into a contract to sell the Johnson farm to Payne. The contract was signed by Peck as Johnson's agent and was legal as to form and according to Johnson's original instructions to Peck, except that the price was to be $90 per acre. Johnson had no knowledge of the contract with Payne until after Payne had signed it. Upon learning of the deal, Johnson refused to deliver a deed and Payne brought an action for specific performance. Who should prevail? State reasons. Be brief!

Johnson should prevail.

Here the purchaser was bound to know the extent of the agent's authority. The contract made by the agent exceeded that authority, and the principal repudiated it as soon as he learned that it had been made. There was no conduct or representation by the owner upon which the purchaser relied, so no grounds for estoppel. Spengler v. Sonnenberg, 88 O.S. 192, 205. But see Mechem's Outlines of Agency, § 228 as to secret instructions.

(47)

Rogers is a real estate agent for Riddle. As such agent he sells a parcel of property for Riddle to Smith. Both Rogers and Riddle represent to Smith that the title is free from encumbrances, although they both know of a mortgage then existing against it. Relying on the misrepresentations, Smith purchases the property and later loses $1,000 when he has to pay the mortgage. Smith sues Riddle, the principal and recovers a judgment for $1,000. Riddle is insolvent and Smith cannot collect. Thereafter Smith sues Rogers.

(a) Can Smith maintain this action?

(b) Should Smith recover a judgment against Rogers, the agent? State reasons. Be brief!

(a) Yes.

(b) Yes.

One who has been defrauded by the misrepresentations of an agent of an owner of property sold to her as to the incumbrances thereon, may maintain her action against such agent for the fraud, notwithstanding she has proved up her claim against the principal upon such principal's adjudication in bankruptcy, but has realized nothing from the bankrupt's estate. Rader v. Basch, 18 C.C.(N.S.) 23, 32 C.D. 565.

(48)

A master is under contract to deliver pure milk to the

proprietor of a cheese and butter factory. He entrusts the delivery to a servant, who, to gratify his malice toward his employer and with intent to injure him, adulterates the milk. Is the master liable?

Yes.

A master is liable for the malicious acts of his servant whereby others are injured, if acts are done within the scope of the employment and in the execution of the service for which he was engaged by the master.

Where a master owes to a third person the performance of some duty, as to do or not to do a particular act, and commits the performance of the duty to the servant, the master cannot escape responsibility if the servant fails to perform it, whether such failure be accidental or wilful, or whether it be the result of negligence or malice. Nor is the case altered if it appear that the malice was directed to the master. Stranahan Brothers Catering Co. v. Coit, 55 O.S. 398; doctrine approved in Ins. Co. v. Sturtevant Co., 116 O.S. 299, 305.

(49)

Goods were consigned by an agent without authority, to a commission firm which made advances on them to the agent. The agent's employer sued the agent and stopped the goods in transit.

Can the consignee replevin these goods?

Yes.

An action by the owner of goods, to recover their price and value from his agent, who, without proper authority, has consigned them for sale on commission and received advances upon them, is PRIMA FACIE evidence of a ratification of the consignment.

Goods were consigned by an agent, without proper authority from the owner, for sale on commission by the consignees, who, in good faith, advanced money upon them to the agent, supposing him to be the owner of the goods. While the goods were in transit, the owner replevied them from the carrier, and also brought an action against the agent, to recover their price and value. In an action of replevin, subsequently brought by the consignee against the owner, to recover possession of the goods, it appearing that the owner's said action for their price and value was still pending, and there being no evidence that it was brought or prosecuted under any mistake of the facts: Held, that under the circumstances, the owner was estopped from denying the authority of his agent to make the consignment. Frank v. Jenkins, Bro. & Chipman, 22 O.S. 597.

(50)

Can a real estate broker who assumes to act for both contracting parties in making an exchange of real estate,

recover compensation for his services from either?

No.

The double agency of a real estate broker, who assumes to act for both parties to an exchange of lands, involves, PRIMA FACIE, inconsistent duties; and he cannot recover compensation from either party, even upon an express promise, until it is clearly shown that each principal had full knowledge of all the circumstances connected with his employment by the other which would naturally affect his action, and had assented to the double employment. But when such knowledge and consent are shown, he may recover from either party. Bell v. McConnell, 37 O.S. 396.

(51)

The manager of the O Company in Cleveland instructed X, a chauffeur, to drive one of the company's automobiles to the dock at the foot of East 9th street, and to ship it by boat to Detroit. X drove to a restaurant, met two girls, and agreed to take them to Euclid Beach, several miles in the opposite direction from which he should have gone to the boat.. On the way to the beach, X negligently runs down and kills M. Is the O Company liable?

No.

The test of a master's liability lies in proof of the fact that, if the negligent act was done by a servant, it was done in the course of his master's employment and while engaged in the service of the master. Braun v. Averdick, 113 O.S. 613, 617; citing, Lima Ry. Co. v. Little, 67 O.S. 91; Coal Co. v. Rivoux, 88 O.S. 18; Elms v. Flick, 100 O.S. 186.

A principal is not responsible for every act which his agent may commit. If the agent has finished that which he was authorized to do, or if he leaves the principal's affairs to attend to some of his own, and then commits the act complained of, the principal will not be responsible.

If the agent is where he has no business to be, where he has no duty or purpose, where his authority does not call him—if he is engaged in that which does not concern his principal—and then commits a tort, the principal is not liable. Mechem on Agency, § 258.

(52)

B owns an automobile. He permits his wife to use it whenever she wants to. While he is absent from the city, his wife takes their four year old child to church. On the return trip, she negligently runs over X, a pedestrian, and severely injures him. X sues B for personal injuries. Can X recover from B?

No.

In an action against the husband for his wife's negigence, the marital relationship, of itself, is not a sufficient

ground for recovery against him. It must be proven that the negligent acts of the wife were committed in the furtherance of her husband's business or in the execution of his orders. A relation of principal and agent or of master and servant between them must be shown as a basis for recovery against him.

When, by permission of her husband, the wife is allowed to use the latter's automobile for her own purposes, proof that the car was his, that she was his wife, and that she took her child with her to religious services, does not, IPSO FACTO, make the husband liable as her principal. Bretzfelder v. Demaree, 102 O.S. 105.

(53)

An Ohio corporation asked its attorney B to foreclose a mortgage in Pennsylvania, although, as the corporation knew, B was an Ohio lawyer and had not been admitted to practice in Pennsylvania. B forwarded the papers to X, a Pennsylvania lawyer, who foreclosed the mortgage, acting in the corporation's name. X returned the papers together with his bill, to B, who transmitted them to the corporation. Before the attorney's bill was paid, Y sued B and attached the amount due on the bill in the hands of the corporation.

Judgment for whom, and why?

Judgment for B.

X was agent for the corporation and not for B, and hence B had no rights in the proceeds of the agency. Where a sub-agent is appointed by authority of the principal, the sub-agent is, so far as relates to third persons, the agent of the principal, and the acts of the sub-agent are binding upon the principal; but whether, as between principal and sub-agent, the relation of principal and sub-agent is created, so that the sub-agent is responsible to the principal, depends upon whether the agent has been authorized to employ the sub-agent on the principal's behalf—that is—, to create privity of contract between them—or has been authorized simply to employ a sub-agent on his own responsibility. Tiffany on Agency, Second Ed., p. 209, § 83.

(54)

A promissory note due in New York was deposited in an Ohio bank for "collection and remittance." After collection and remittance were made, the Ohio bank gave the depositor of the note a draft on another New York bank for the proceeds, but the Ohio bank failed before the draft could be collected. Thereafter, the latter New York bank remitted the balance due from it to the insolvent bank to its receiver. Thereupon suit was instituted by the depositor of the note against the receiver.

Decide the case. Give specific reasons for your de-

cision, limiting them to six lines of your manuscript.

The depositor is entitled to a priority over the general creditors of the insolvent bank.

G.C. § 714 provides:

"In any case where any bank incorporated under the laws of this state or any unincorporated bank doing business within this state, shall have in its possession the proceeds realized from the collection of any negotiable instrument by it or by any other collecting agency, at the time that such bank is closed by the superintendent of banks of Ohio or by action of its board of directors or by any other proper legal action, or in any case where any such bank shall in payment of such proceeds of collection draw a draft upon another banking institution which draft shall remain unpaid at the time such bank drawing same is closed, as aforesaid, the assets of such bank so closed shall be impressed with a trust in behalf of the owner of the negotiable instrument the proceeds of which are held by such bank so closed or payment of such proceeds has been attempted by such bank so closed by drawing a draft as aforesaid, and the owner of the negotiable instrument shall be entitled to payment upon liquidation of the assets of such bank as a preferred claim."

The draft in question came in due course to the bank whose duty it was to pay it, and which had the funds on hand with which to pay it, and that bank accepted the draft and intended to pay it. It is difficult, indeed, to assign any sound reason why that presentment for payment and that acceptance for payment were not tantamount, in legal effect, to the actual payment of the draft, thereby making the New York Bank the holder of that portion of the funds in its hands as trustee for the Ohio bank. Blair v. Union Savings Bank of Bryan, 119 O.S. 142.

(55)

Higgins was the sole owner of fifty mahogany logs, which he put in the possession and control of Tremont, his agent, with full power to sell the logs for cash. Tremont sold the logs to Butler, who had no knowledge of the agency, under an arrangement whereby the latter paid Tremont $3,000 in cash for the logs, and the balance of the purchase price—to-wit $5,000—was paid by the application thereto of a claim which Butler held against Tremont the agent himself.

If immediately on discovery by Higgins of the sale of the logs and the terms of his agent's contract, he comes to you to ascertain his respective rights and remedies in the premises as against Tremont and Butler, what will your opinion to Higgins be? Confine your answer to one-half page of your manuscript.

Where an owner of goods or merchandise intrusts them

for purpose of sale to his agent, giving to him the indicia of ownership therein, a purchaser in good faith from him, who pays the agent, being deceived as to the ownership of the property, receives good title and cannot be held accountable for the money paid the agent. Since the owner's conduct in intrusting the goods to the agent has enabled the latter to mislead the purchaser by his statement that he owned them, the rule that where one of two innocent persons must suffer the loss should fall upon the one who enabled the wrongdoer to perpetrate the fraud, should be applied. Where the owner of personalty puts the same in the possession and control of his agent to be sold by him, and he sells it to a third person under an arrangement whereby the latter pays partly in cash for said personalty, and the balance is paid by the application thereto of a claim which the purchaser holds against the agent himself, and the purchaser has no knowledge of the fact of such agency, but believing and having reasonable ground to believe the agent to be the absolute owner of such personalty, such contract of sale is valid and binding as against the real owner, and cannot be repudiated by him.

If, in such case any part of the purchase money is unpaid by the purchaser, the real owner of the personalty has the right, by notifying the purchaser of his ownership, to compel the payment to him as the real owner of the amount still unpaid according to the terms of the contract, but in so doing, the real owner must affirm the contract of sale in all its parts, and must accept the payment as made by the antecedent debt of the agent to the purchaser, so far as the same applies on the purchase price. Bennett & Witte v. M. J. Williamson, 9 C.C. 107, 6 C.D. 599.

Tremont is liable to account for the funds arising from the sale of the goods, and may likewise be prosecuted criminally either on the charge of embezzlement or obtaining money under false pretense. See G.C. §§ 12467, 13104.

(56)

Adams employed Brown as his agent to invest money in a wheat gambling deal at Chicago and delivered to Brown $1,000 in money to be used in such deal. Brown invested the money and made a profit of $500 on the venture and then had $1,500 in his hands. This money Brown refused to turn over to Adams and when Adams sued Brown to recover the money the latter defended on the ground that the transaction was a gambling contract.

Decide the case and give reasons, confining them to four lines of your manuscript.

Judgment for Adams for $1,500.

While courts will not enforce an illegal contract between the parties, yet, if an agent of one of the parties has, in the prosecution of the illegal enterprise for his principal,

received money or other property belonging to his principal, he is bound to turn it over to him, and cannot shield himself from liability therefor upon the ground of the illegality of the original transaction.

It is contrary to public policy and good morals, to permit employees, agents or servants to seize or retain the property of their principal, although it may be employed in illegal business and under their control. No consideration of public policy can justify a lowering of the standard of moral honesty required of persons in these relations. And again, if parties to an illegal contract, waive the illegality, and honestly account as between themselves, no other person can be heard to complain of such accounting. Hence, we think, that if in making such settlement one of the guilty parties should deliver property or money to an agent of another to be delivered by the agent to his principal, such agent is bound to account therefor to his principal. Norton v. Blinn, 39 O.S. 145, 149, 150.

(57)

Locke was proprietor of a hotel conducted solely for lodging purposes, and Clemens was and had been a guest at the hotel for a period of several weeks. Clemens frequently lounged in the hotel office and engaged in conversation with Locke. One evening Locke was called on business outside of the hotel and before leaving the office he said to Clemens, who was then lounging there—"Please watch things until I return in a few minutes." While Locke was absent, Smith came into the hotel as a guest and Clemens exhibited to him the hotel register, in which Smith wrote his name as a guest and was assigned a room by Clemens, whereupon Smith deposited his money and valuables for safekeeping with Clemens and he gave Smith a receipt therefor in the name of Locke.

Later in the evening, Clemens absconded with Smith's property. Smith sued Locke to recover the value of his property, and as a defense Locke denied that Clemens had any authority to receive the money and valuables, or to issue a receipt therefor.

Decide the case specifically, giving basic reasons for your decision.

Smith should recover the value of his property from Locke. A guest arrived at a hotel in the nighttime, was assigned to a room and deposited his money and valuables with a person who was apparently in charge as clerk or cashier, who issued a receipt to the guest but later absconded with his property. In an action by the guest to recover the value of the stolen property, the proprietor of the hotel denied the agency of the person who received the property and issued the receipt. Held:

The proprietor is liable under the doctrine of agency

by estoppel, which is based upon the principle that where one designedly or negligently permits another to act as an apparent agent, any loss, as between two innocent parties will fall upon the one whose conduct brought about the situation. Kanelles v. Locke, 12 App. 210, 31 O.C.A. 280, 32 C.D. 110.

(58)

A and B were respectively the owners of two adjoining tracts of standing timber. A sold his timber to Hardwood Co. for a specified sum of money. Hardwood Co. was represented by C, its agent, who superintended the cutting of the timber on A's land. C, without the knowledge of any other person connected with Hardwood Co., directed the workmen in his charge to cut down and saw into logs twenty trees of the value of $1,000 standing on B's land, but close to A's land, notwithstanding the vigorous protests of B, who ordered C and the workmen from his land, before the twenty trees were cut.

C, after B's protest and order to leave the premises, caused the said logs to be conveyed to Hardwood Co.'s mill yard and to be converted into lumber; and not until thereafter did the officers of Hardwood Co. know that B's twenty trees had been so appropriated.

B commenced suit against Hardwood Co. as sole defendant to recover $3,000 in damages—$1,000 for compensatory damages and $2,000 for exemplary or punitive damages.

Decide the case, giving brief reasons for your decision.

B can recover from the Hardwood Co. only the $1,000 for compensatory damages.

Exemplary or punitive damages, being awarded not by way of compensation to the sufferer, but by way of punishment to the offender, and as a warning to others, can only be awarded against one who has participated in the offense. A principal, therefore, though, of course, liable to make compensation for injuries done by his agent within the scope of his employment, cannot be held liable for exemplary or punitive damages merely by reason of wanton, oppressive, or malicious intent on the part of the agent. In other words, where that which is tantamount to punitive or exemplary damages is to be recovered by reason of the willful character of the wrongful act, proof of this knowledge and willfulness on the part of the party producing the wrong must be made. The employer cannot be punished for the personal guilt of his servant or agent, unless the employer authorized, ratified, or participated in the wrongdoing. 5 Fletcher on Corporations, § 3354; Mechem on Agency, §§ 2013, 2014, 2015; cited in Tracy v. Coal & Land Co., 115 O.S. 298, 302, 303.

Bailments

(Numbers in parenthesis refer to answers following.)

I. DEFINED AND DISTINGUISHED. (4, 6, 14, 16, 26, 43, 48)

Bailment, 3.

16 O. 431; 1 O.S. 244; 5 O.S. 101; 46 O.S. 244; 48 O.S. 255; 18 C.D. 583.

II. FORMS OF BAILMENT. (31, 36)

Bailment, 4.

See Ans. 15 Memory Work; 1 O.S. 244; 28 O.S. 388; 48 O.S. 255.

III. LIABILITY OF BAILEE.

A. For Negligence, Care Required. (12, 18, 31, 46)

Bailment, 6.

27 O.S. 484; 37 O.S. 487; 103 O.S. 638; 115 O.S. 539.

B. Gratuitous Bailee. (8, 12, 17, 18, 21, 36)

Bailment, 7.

28 O.S. 388; 39 O.S. 105; 1 W.L.J. 393; W. 598.

C. Limitation of Liability. (11)

Bailment, 14.

See also IX. (F) infra; G.C. § 8459; 36 O.S. 647; 114 O.S. 76; 22 N.P.(N.S.) 141.

D. Liability for Conversion. (13, 28, 37)

Bailment, 8; Trover and Conversion, 3, 4, 17.

G.C. § 12475.

IV. RIGHTS AND LIABILITIES OF THIRD PERSON. (22, 30, 38, 42)

Bailment, 11.

5 O. 202; 27 O.S. 435; 37 O.S. 254, 260; 18 App. 97.

V. LIEN OF BAILEE.

A. In General. (2, 19, 20, 41)

Bailment, 10; Innkeepers, 13.

G.C. §§ 5984, 8353 to 8355, 8358, 8365, 8371; 23 App. 43; 11 C.C. 392; 11 D. Rep. 615.

B. Priority. (5, 23, 41)

Sales, 159.

G.C. § 8434(2); 107 O.S. 583; 11 App. 176.

C. Loss of Lien. (19)

Bailment, 5, 11; Sales, 160.

46 O.S. 560; 8 N.P.(N.S.) 60.

[*References are to Bates' Compact Ohio Digest.*]

VI. PLEDGE AND PAWNBROKER. (1, 9, 15, 26, 33a, 38, 47)

Pawnbrokers, 5 to 7; Pledges, 1 et seq.

G.C. §§ 6337 et seq, 8358 et seq, 9863; 53 O.S. 588; 84 O.S. 32; 111 O.S. 695; 23 App. 71; 12 C.C.(N.S.) 529; 25 C.C.(N.S.) 158.

VII. LIABILITY OF INNKEEPERS OR HOTELS. (12, 35, 40, 44, 46)

Innkeepers, 1 et seq.

G.C. §§ 5981 to 5986; 18 O.S. 343; 44 O.S. 32; 87 O.S. 130; 9 App. 273; 12 App. 210; 12 App. 224; 14 App. 284; 11 C.C.(N.S.) 174; 11 C.C.(N.S.) 380; 16 C.C.(N.S.) 230; 12 C.C.(N.S.) 209; 17 C.C.(N.S.) 169; 32 O.C.A. 236.

VIII. MILLS, WAREHOUSES, WAREHOUSE RECEIPTS. (1, 3, 25, 27, 42, 43, 49)

Warehousemen, 1 to 11.

G.C. §§ 8457 to 8509; 37 O.S. 254; 16 C.C.(N.S.) 165.

IX. COMMON CARRIERS.

A. In General.

Carriers, 3.

G.C. §§ 8365 to 8375; 41 O.S. 166; 52 O.S. 402; 63 O.S. 274; 23 App. 179; 25 App. 538; 7 N.P.(N.S.) 14; 19 N.P.(N.S.) 574.

B. Defined. (32a)

Carriers, 8.

4 O.S. 722; 28 O.S. 144; 108 O.S. 484; 112 O.S. 59; 118 O.S. 95; 18 C.C.(N.S.) 342.

C. Degree of Care Required. (24, 39)

Carriers, 72, 190 to 210.

20 O.S. 259; 33 O.S. 511; 94 O.S. 238; 10 App. 344.

D. Act of God and Vis Major. (29)

Carriers, 74.

23 O.S. 532; 97 O.S. 262; 98 O.S. 42; 4 App. 493; 25 C.C.(N.S.) 379; 26 C.C.(N.S.) 337; 23 N.P.(N.S.) 457.

E. Bills of Lading, Stoppage in Transitu. (7, 34)

Carriers, 33 to 44; Sales, 149 to 155.

G.C. §§ 8437 to 8439, 8993-1 et seq; 19 O.S. 221; 25 O.S. 360; 8 O.F.D. 196.

F. Limitation of Liability. (11, 32b)

Carriers, 98 to 107, 209.

G.C. §§ 8993-2, 8994-1; 19 O.S. 260; 26 O.S. 595; 28 O.S. 418; 36 O.S. 448; 36 O.S. 647; 65 O.S. 403; 72 O.S. 302; 95 O.S. 64; 11 App. 196; 17 App. 73.

G. Liability of Connecting Carriers.

Carriers, 110 to 118, 210.

G.C. § 8994-1; 19 O.S. 221; 22 O.S. 324; 80 O.S. 128; 94 O.S. 189; 17 App. 76; 18 App. 481; 22 C.C. 326; 5 N.P.(N.S.) 585.

H. Delay in Transportation, Delivery. (29, 39, 45)

Carriers, 27 to 64, 70 to 73.

61 O.S. 341; 113 O.S. 499; 22 App. 37; 6 N.P.(N.S.) 589.

I. Damages. (10, 24, 39)
Carriers, 64, 85, 135, 225, 276 to 280, 296.
G.C. § 8994-1; 34 O.S. 16; 83 O.S. 293; 17 App. 73; 32 O.C.A. 1; 6 N.P.(N.S.) 589.

X. FACTOR'S ACT.
See Agency, XXII.

Definitions

BAILMENT.—A delivery of something of a personal nature by one party to another, to be held according to the purpose or object of the delivery, and to be returned or delivered over when that purpose is accomplished. Bouvier's Law Dictionary, Baldwin's Revision.

COMMON CARRIERS.—A common carrier is one whose business, occupation, or regular calling it is to carry chattels for all persons who may choose to employ and remunerate him. Bouvier's Law Dictionary, Baldwin's Revision.

A common carrier is one that undertakes for hire or reward to carry, or cause to be carried, goods for all persons indifferently who may choose to employ him, from one place to another. U. S. Express Co. v. Backman, 28 O.S. 144.

ACT OF GOD.—An accident due to natural causes directly and exclusively without human intervention, such as could not have been prevented by any amount of foresight, and pains, and care reasonably to have been expected. Bouvier's Law Dictionary, Baldwin's Revision.

VIS MAJOR.—A loss by vis major is one that results immediately from a natural cause without the intervention of man, and could not have been prevented by the exercise of prudence, diligence, and care. Bouvier's Law Dictionary, Baldwin's Revision.

STOPPAGE IN TRANSITU.—A resumption by the seller of the possession of goods not paid for, while on their way to the vendee and before he has acquired actual possession of them. Bouvier's Law Dictionary, Baldwin's Revision.

OHIO STATE BAR EXAMINATIONS

QUESTIONS WITH ANSWERS

[*Arranged Chronologically.*]

(1)

(a) Jackson, a warehouseman, innocently accepts merchandise from Black for shipment. Jackson, at Black's request, advances $500 for packing and loading the goods on cars. It is discovered after the cars are loaded that Black had stolen the goods from Smith. Smith demands the goods from Jackson who refuses to turn them back until he is reimbursed for the $500 expended and claims a lien. Is Jackson's contention correct? State reasons. Be brief.

(b) Suppose Jackson was a pawn broker and had innocently loaned Black $500 on the stolen goods. Would your answer be different? State reasons. Be brief.

(a) Yes, if the statute is literally construed.

"Every person in whose name merchandise is shipped, or delivered to the keeper of a warehouse, or other factor or agent, to be shipped, shall be deemed the true owner thereof, so far as to entitle the consignee of such merchandise to a lien thereon:

1. For any money advanced, or negotiable security given by such consignee, to or for the use of the person in whose name such shipment, or delivery of merchandise to be shipped, has been made.

2. For money or negotiable security received by the person in whose name such shipment, or delivery of merchandise to be shipped, has been made to, or for the use of such consignee." (G. C. § 8358.)

There is, however, some doubt as to this construction. (See Williston on Sales, Vol. 1, § 321).

(b) Yes.

There would be no lien in the case of a pawn broker. There is no lien provided by the statutes, as in the case of innkeepers and warehousemen, and he would have none at common law, for there was no labor or work performed on the goods.

The pawnee has no right to retain possession as against the true owner, of an article pawned without the latter's consent or authority, even where the pawnee is in possession for a specific purpose, such as to sell the article on commission, or to sell it to a particular person. (30 Cyc. 1166, A. C. III). Levine, "Law of Pawnbroking" § 21.

(2)

Mrs. Jones rents a room of her house to Mr. and Mrs. Smith.

At the end of a month the Smiths refuse to pay rent and Mrs. Jones seizes their baggage and refuses to release it until the rent is paid. The Smiths start replevin proceedings. Who should prevail? State reasons. Be brief.

The Smith's should prevail.

Mrs. Jones is a private person, and not an innkeeper, and cannot get the benefit of the innkeeper's lien as provided in G. C. § 5984.

That statute provides that an innkeeper shall have a lien on the baggage and other property in and about such inn belonging to or under the control of his guests or boarders for the proper charges due him for their accomodation, board and lodging, for money paid for or advanced to them, and for such other extras as are furnished at their request. The innkeeper may detain such baggage and

other property until the amount of such charge is paid, and the baggage and other property shall not be exempt from attachment or execution until the innkeeper's lien and the cost of enforcing it are satisfied.

A landlord is not an innkeeper and has no such lien nor has a boarding house keeper. (See Preston v. Neale, 12 Gray (Mass.) 222).

(3)

Jones, a warehouseman, receives grain from Smith to mix with other grain, with an option either to pay for it or return a similar amount of mixed grain. After the delivery by Smith, but before the mixing, Jones becomes insolvent and a receiver takes over the business. Smith demands return of the grain. Can Smith prevail? State reasons. Be brief.

No.

A warehouseman, receiving grain to mix with other grain with an option either to pay for it, or return a similar amount of grain, is not a bailee, but a buyer; the property is in him, and passes to his receiver in insolvency. (Gibbs v. Townsend, 9 C. C. 409, 4 C. D. 96; Aff. without opinion Gibbs v. Townsend, 55 O. S. 652, 48 N. E. 1112).

"In the case of a regular deposit, the bailee is bound to return the specific article deposited, but where the depositary is to return another article of the same kind and value, or has an option to return the specific article, or another of the same kind and value, it is an irregular deposit or mutuum, and passes the property as in a case of ordinary sale or exchange. Sir William Jones says: "it may be proper to mention the distinction between an obligation to restore the specific things, and a power or necessity of returning others of equal value. In the first case it is a regular bailment; in the second it becomes a debt. In the latter case he considers the whole property transferred." (9 C. C. 409, 4 C. D. at p. 99 Supra).

(4)

Black, a butcher, contracts with Green a farmer, for the delivery of fifty cattle by Black to Green, of specified weight and at a named price per pound, payment not to be made for six months during which time the cattle were to be fed by Green and then redclivered to Black at an increased price per pound. During the six-month period ten cattle were killed by lightning. Who stands the loss? State reasons. Be brief.

Green stands the loss.

"A contract for the sale by A to B of twenty-two cattle, of a specified aggregate weight and at a named price per

pound, payment not to be made for some months, during which time the cattle were to be fed by B and then resold to A at an increased price per pound, is not a bailment, nor an executory sale from A to B, but the sale is absolute and title passes, and loss from injury to possession of B and before the time fixed for their resale to A, must be borne by B. (Gills v. George, 8 C. C. (N. S.) 393, 18 C. D. 583).

(5)

Brown engages a room at the Statler Hotel and stays two weeks. During the two-week period, Brown fraudulently represents to Smith that he is an agent of the United States Secret Service and relying upon this representation Smith delivers two revolvers to Brown and charges them to the U. S. Government. Brown leaves the hotel without paying and the Statler Company seizes Brown's handbag containing the guns. Smith brings an action against the Statler Company who claim a lien.

Who should prevail? Give reasons. Be brief.

The Hotel Statler should prevail.

The lien of an innkeeper attaches to a typewriter, left at the inn by a guest who departed without paying his bill, notwithstanding the guest had no title to the machine, and had obtained possession of it by false pretenses. (Thoma v. Typewriter Co, 11 C. C. (N. S.) 174, 20 C. D. 691).

"Such innkeeper shall have a lien on the baggage and other property in and about such inn, belonging to or under the control of his guests, or boarders for the proper charges due him for their accomodation, board and lodging, for money paid for, or advanced to them, and for such other extras as are furnished at their request. The innkeeper may detain such baggage and other property, until the amount of such charge is paid, and the baggage and other property shall not be exempt from attachment or execution, until the innkeeper's lien and the cost of enforcing it are satisfied. (G. C. § 5984).

The relation between Brown and the Statler Hotel was that of innkeeper and guest. This being the relation, the Statler Hotel was entitled at common law to a lien upon the baggage and other property of the guest brought by him into the hotel, and the hotel was entitled to detain any property brought into the hotel by the guest as security for the payment of an amount due by the guest for lodging, board, and accomodations furnished. This lien became a part of the law of this state, as our courts administer the common law of England, in so far as its principals are not inconsistent with our own institutions or opposed to the habits, customs and policies of the people of our state. (R. R. Co. v. Keary, 3 O. S. 202).

This being so, the hotel could retain the guns in question for the unpaid amount of its guest's bill unless G. C. § 5984 would deprive it of its lien. We hold this section is declaratory of the common law and does not enlarge or extend an innkeeper's lien, so far as it relates to the property of a third person in the possession of the guest, and that said section is not in violation of any constitutional right. Under the facts, in this case, Brown was possessed of the guns in question and they were under his control. The words "under the control of the guest," we think should be construed in the light of the common law decisions, and while the title to the guns in question may not have passed to Brown, yet the hotel had a lien on the guns superior to the right of Smith to retake possession of the same. Thoma v. Typewriter Co., 11 C.C.(N.S.) 174 at p. 175, 20 C.D. 691.

(6)

A, the owner of an automobile, delivers it to B under an agreement that B is to keep and use it, but not remove it from the county, and that B is to return the automobile at the end of sixty days, provided that if B pays A the agreed price therefore within that time he may become the owner of the automobile. State whether this is a bailment or sale. Why?

This is a bailment with an option to purchase. No title is to pass except in case the bailor should decide to pay the stipulated amount within the time designated.

"However in the case of grain elevators, it is generally held that where the warehouseman has the option to deliver the grain, or to sell it when the market is favorable, and pay the market price on presentation of the warehouse receipt, the transaction is a sale and title passes in the absence of special circumstances showing that the parties intended a bailment." (Chase v. Washburn, 1 O. S. 244).

"Where goods are delivered to a party, but title to the goods does not vest in him until he has in some way manifested his approval, the result is that such person acquires title by his approval at a later date. It is therefore clear that such a transaction is not in its inception a sale at all, but a mere bailment, and remains such until it is converted into a sale by the approval. The so-called "Sale on Approval" is therefore a mere bailment, with option in the bailee by his approval to convert the bailment into a sale." (Dobie on Bailments, p. 10).

(7)

What should a bill of lading contain?
Write a form.

(a) A bill of lading issued by a carrier is at the same time both a receipt for the goods delived to the carrier,

and also a contract containing the terms of the agreement for the transportation of the goods. (Dobie on Bailments, p. 196).

Every bill must embody within its written or printed terms.

(a) Date of its issue;

(b) The name of the person from whom the goods have been received;

(c) The place where the goods have been received;

(d) The place to which the goods are to be transported;

(e) A statement whether the goods received will be delivered to a specified person, or to the order of a specified person;

(f) A description of the goods, or of the packages containing them which may, however, be in such general terms as are referred to in G. C. § 8993-22, and

(g) The signature of the carrier or his agent.

A negotiable bill shall have the words "order of" printed thereon immediately before the name of the person upon whose order the goods received are deliverable. (G. C. § 8993-1).

(b) The.....Railway Company, received, subject to the classifications and tariffs in effect on the date of the issue of this original Bill Of Lading, at.....Date..... 192... From.....the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

(State Place to which goods are to be transported and to whom (or order)

Signed The ..... Railroad Co.
By....., Agent

(owner or duly authorized agent of owner)
Party of the second Part.

(Regular form prescribed by the Interstate Commerce Commission)

(8)

A agreed to repair the battery of B's automobile gratuitously, but in repairing same, A, in an unskillful and negligent manner ruined the battery.

What remedy has B, if any? Why?

A was a gratuitious bailee and can only be held for gross negligence. "In a bailment for the bailor's sole benefit, the bailee's duty is to exercise only slight care." (Dobie on Bailments, p. 34).

"A bailee who acts without reward in a case in which neither his situation nor employment necessarily implies any particular knowledge or professional skill, is held to be responsible only for bad faith or gross negligence. But if a physician should undertake gratis, to attend a wounded person, and should treat him improperly, he would be liable for improper treatment, because his profession implied skill. If, however, the business to be transacted presupposes a particular kind of knowledge, and a person totally ignorant of the subject undertakes it, without reward, it is said that he cannot excuse himself on the ground that he performed the act as well as he was capable." Swan's Treatise, p. 435. Hence the present set of facts raises a close question that could be well argued on either side and should be determined by the jury.

(9)

What difference, if any, between a mortgage conveyance of goods and a pledge of goods?

In a pledge, possession passes, but title does not; while in a chattel mortgage, title passes, but possession need not.

In a pledge, the property may be sold on the non-payment of the debt, and only so much of the proceeds as will pay the debt, passes to the pledgee. In a mortgage, at common law, the property passes wholly to the mortgagee on the non-payment of the debt. (Hale on Bailments, p. 101, 108).

The difference between a mortgage conveyance of goods to secure a debt, and a pledge of goods for the like purposes, is this: Where goods are mortgaged, the title passes conditionally to the mortgagee, and if not redeemed within the time stipulated by the payment of the debt, the title becomes complete and absolute in him at law; but a court on its equity side, may compel a redemption of goods and an account, even tho the parties agree that the mortgagee shall have the property mortgaged if the debt be not paid. If there is a pledge, a special property only passes to the pledgee at law, the general property still remaining in the pledgor. (Swan's Treatise, p. 437-8, 25th Ed.)

(10)

A sent a consignment of wheat from Columbus, Ohio, to New York City. The wheat was lost by fire at its destination before delivery. While the wheat was in transit, the price dropped fifteen cents per bushel. How and where is the value to be estimated? Give reason for answer.

The value would be that, at the place of delivery at the time for delivery. (Dobie on Bailments, p. 510).

The general rule of damages in an action against a common carrier, where he is liable for a loss, or for non-delivery of any portion of the goods which he undertook to deliver, is the value of the goods at the time and place when they should have been delivered with interest, less the proper charges of transportation. (McGregor v. Kilgore, 6 Ohio 358).

"In the absence of both contract and statute to the contrary, the liability of a railroad company, as a common carrier continues, until notice to the consignee of the arrival of his goods and reasonable time during business hours after receipt of the notice to inspect and remove them, unless he is unknown, absent, or cannot be found, in which case the goods may be stored." (Railroad Company v. Sheppard, 56 O. S. 68, 46 N. E. 61).

(11)

(a) May parties by special contract diminish the liability of the bailee?

(b) If so, are there any exceptions?

(c) If parties cannot so agree, state reasons.

(a) Yes.

The parties to a bailment may diminish the liability of the bailee by special contract, the principle being that the bailee may impose whatever terms he chooses, if he gives the bailor notice that there are special terms and the means of knowing what they are; and if the bailor chooses to make the bailment, he is bound by them. (6 C. J., p. 1112, § 44 (3); See also Dobie on Bailments, p. 18).

(b) There are certain exceptions to this rule. The contract must not be in violation of law or of public policy and it must stop short of negligence of the bailee; and the terms of such contract must be clear inasmuch as stipulations are to be strictly construed. (6 C. J., p. 1112, §44 (3); Dobie on Bailments, p. 19).

A carrier may insert in a bill issued by him, any other terms and conditions provided that such terms and conditions shall not

(a) Be contrary to law or public policy, or

(b) In anywise impair his obligation to exercise that degree of care in the transportation and safekeeping of the goods intrusted to him which a reasonably careful man

would exercise in regard to similar goods of his own. (G. C. § 8993-2).

Furthermore a carrier cannot stipulate against the negligence of its servants or defective vehicles. (See R. R. Co. v. Supply Co. 11, App. 196; Welsh v. Pittsburg etc. R. R. Co., 10 O. S. 64).

Neither can an innkeeper contract away his liability or that of his servants for all negligence of either of them. (See G. C. § 5982, Dobie on Bailments, p. 280.)

(c) The reasons why parties are not permitted to so agree is that such agreements are contrary to the public policy of the state, as evidenced by the acts of the legislature and the decisions of the courts of the state. (Railroad Co. v. Supply Co., 11 App. 196 at p. 202).

(12)

A, for several weeks, was a guest of a hotel. His business called him to other cities. Each week he checked out with expectation of returning at end of week as a guest. By arrangement with a porter, an authorized employe, A left his trunk and contents for storage until his weekly return, and obtained a receipt therefor. While A was absent, his trunk and contents were stolen from storage.

(a) Was there a bailment?

(b) If not, why?

(c) If so, what kind of bailment and what degree of car was bailee required to use?

(d) Would fact that bailee received no compensation for storage control or affect his liability?

(a) Yes.

"Plaintiff for several consecutive weeks became a guest of a hotel. His business calling him to adjacent cities, he checked out each week with the expectation of returning at the end of the week as a guest. Each week the plaintiff returned to the hotel staying as a guest for three or four days. The hotel was provided with special storage rooms, used as a necessary incident to its business, for customers who left their baggage until their return. By arrangement with an authorized employe plaintiff left his trunk and contents for storage in such room until his weekly return, and obtained a receipt therefor. Held: the facts stated make this a bailment for mutual benefit, based upon a sufficient consideration, and the bailee was required to use ordinary care for the safekeeping of the goods." (Hotels Statler Co. v. Safier, 103 O. S. 638, 134 N. E. 460).

(b) Answered in (a).

(c) Bailment for mutual benefit, based upon sufficient consideration and bailee would be required to use ordinary care for safekeeping of the goods. (103 O. S. 638, 134 N. E. 460 supra).

(d) No, because the patronage was sufficient consideration. (103 O. S. 638, 134 N. E. 460 at p. 463).

"Where a bailment is a mere incident to the performance of services for which the bailee receives compensation or to the conduct of a business from which the bailee derives profit, it is a bailment for mutual benefit although the bailee receives no compensation for the bailment as such." (6 Corpus Juris, 1100).

"When the bailment is reciprocally beneficial to both parties, the law requires ordinary diligence on the part of the bailee, and makes him responsible for ordinary neglect." (Story on Bailments, (9th Ed.) p. 27).

Manifestly the bailment, in a case like the present, is of the latter class, for while the customer pays nothing directly or eo nomine, for the safe-keeping of his effects, the dealer receives his compensation in the profits of the trade of which the bailment is a necessary incident.

(13)

If goods or merchandise were given to or deposited with a bailee, would the bailee be criminally liable if he

(a) destroyed
(b) sold
(c) converted to his own use, or
(d) removed goods from county where deposited?

(a) Yes, if he had intent to defraud.
(b) Yes, if he had intent to defraud.
(c) Yes, if he had intent to defraud.
(d) Yes, if he had intent to defraud.

Whoever, with intent to defraud, sells, secretes, destroys, converts to his own use, or otherwise disposes of chattels, goods, merchandise, or personal property, the possession of which has been given to him in trust, pledge, bailment or on deposit or under an agreement to purchase it on installment, payments or otherwise, and any person so holding such property, who, with intent to defraud, removes it beyond county, where it was stipulated, such property should be kept, shall be fined not more than $500 or imprisoned not more than three months, or both. (G. C. § 12475).

(14)

(a) What is the very essence of a contract of bailment?

(b) What is the fundamental distinction between a sale and a bailment?

(c) What determines whether a transaction constitutes a conditional sale or bailment of property?

(d) Distinguish a bailment from a mortgage of personal property.

(a) Possession must pass, but ownership must not. It is of the very essence of a contract of bailment that it shall contemplate the return of the property bailed, either in the same, or in an altered form. (6 C. J. p. 1086, § 3).

(b) In a sale, title must pass, though possession need not, whereas in a bailment possession must pass and title cannot.

Tiffany says: "the elements which distinguish a sale from other transactions are (1) that the transfer is of the general property, (2) that it is for a price. If, in a transfer, either element is lacking, the transaction is not a sale. In most cases, the test of a bailment is whether or not it is the intention of the parties that the thing received shall be returned. If the identical thing is to be returned, although in an altered form, the transaction is a bailment; but if the identical thing is not to be returned, and the receiver may deliver some other thing instead, the transaction is a sale or exchange.(Tiffany on Sales, 2nd Ed. p. 6).

(c) The intention of the parties and the purpose of the transfer determines whether the transaction is a conditional sale or a bailment. If title is to pass upon the happening of the condition, then it may be said to be a conditional sale, whereas, if possession has passed merely to accomplish a certain purpose and upon its accomplishment, the specific goods are to be returned, then it is a bailment. (6 C. J. p. 1088, § 5 B).

(d) In a chattel mortgage, title passes from the mortgagor to mortgagee, while possession may or may not pass. In a bailment possession must pass and title must not. (6 C. J. p. 1098, § 12).

(15)

(a) In the absence of an express agreement can a pledgee become a purchaser of pledged property?

(b) If the property is offered at sale and bid off by the pledgee, does that terminate the contract of pledge?

(c) Does relationship of the parties thereupon change?

(d) If pledgee thereupon sells or otherwise disposes of goods pledged and puts it out of his power to perform his part of the agreement, what will be the extent of his liability?

(a) No.

The pledgee like a trustee, cannot be the purchaser, and if he buys, he is simply in of his former title. He holds the property in a fiduciary capacity, which forbids the disposition of it for his personal benefit, and requires good faith and fidelity to the interests of the pledgor in making

a sale of it. His duty as a seller is inconsistent with his interests as a purchaser and the principle that a trustee cannot be a purchaser at his own sale is applicable. (Glidden v. Mech. National Bank, 53 O. S. 588, at p. 599, 42 N. E. 995; also Story on Bailments, §319).

(b) No, because the bailment relation still exists.

However the pledgor may elect to treat the transaction as a valid sale in which event the pledgee will be accountable for the net proceeds of the sale. Glidden v. Mech. National Bank, 53 O. S. 588, 42 N. E. 995.

(c) No, unless the pledgor elects to treat the transaction as a sale. Idem.

(d) As it is the duty of the pledgee to redeliver the pledged goods on redemption, if he wrongfully sells, or otherwise disposes of them, he is guilty of a conversion.

The pledgor, in such case, is not limited to his

(1) right to sue either the pledgee or the purchaser for the conversion, but the pledgor may

(2) recover the goods from such purchaser or any other party into whose hands they may have come, or

(3) waive the tort and sue the pledgee in assumpsit for such purchase money, while the latter may use the amount of the pledged debt as an offset. Dobie on Bailments and Carriers, p. 223.

(16)

Define a Bailment.

A bailment is the relation created through the transfer of possession of goods or chattels, by a person called the bailor to a person called the bailee, without a transfer of ownership, for the accomplishment of a certain purpose, whereupon the goods are to be dealt with according to instructions of bailor. (Dobie on Bailments, p. 1).

Bailment is the delivery of goods in trust, for some specific object or purpose, and upon a contract, express or implied, to conform to the object or purpose of the trust. (Swan's Treatise, 25th Ed., p. 431).

A bailment is a delivery of something of a personal nature, to be held according to the purpose or object of the delivery, and to be returned or delivered over, when that purpose is accomplished. Cummins v. Wikoff, 20 N. P. (N. S.) 587 at p. 592, 63 B. 232.

(17)

A steamboat clerk agreed to take a package of money from Cincinnati to Louisville without reward. By reason of the lowness of the Ohio river his boat did not make the trip through to Louisville, but exchanged freight with another boat. He delivered the package of money to the captain of the other boat. The captain failing to find the

man to whom the package of money was addressed, put the package in the postoffice at Louisville, where it was lost. Is the steamboat clerk liable for the loss of the money? Give reason for answer.

No.

A steamboat clerk agreed to take a package of money to Louisville without reward; by reason of the lowness of the river his boat exchanged freight with another, to the captain of which he delivered the package, and he failing to find the addressee, put it in the postoffice, where it was lost. It was held that the clerk is not liable. (Long v. List, 1 D., Repr., 54, 1 W. L. J. 393).

This was a gratuitous bailment, a mandatum, and only slight care need be exercised. (Swan's Treatise, 25th Ed., p. 435).

(18)

What degree of care is required (a) of a gratuitous bailee, (b) of a bailee for hire?

(a) The law requires only slight diligence on the part of a gratuitous bailee, and makes him answerable only for gross negligence. The jury is to determine what is such gross negligence, under proper instructions. (Griffith v. Zipperwick, 28 O. S. 388).

(b) Ordinary care. (Tailor v. Secrist, 3 D. Repr. 53; 13 D. Repr. 183).

(19)

O purchased a watch of D for $175, paid $75 down and was given credit for the balance. Later he left the watch with D for repairs. When O called for the watch he was told that he could not have it until he paid the balance due. O paid D $5 the amount of the repair bill. D still refused to deliver the watch to O until the $100 balance was paid. Can O replevin the watch from D?

Explain your answer.

Yes.

A watchmaker who sells a watch partly on credit is not on receiving it back for repairs, entitled to hold it for the balance. He was a bailee and had no lien beyond the cost of repairs. Owen v. Duhme, 3 D. Repr. 303.

This case appears to be directly contra to G. C. § 8434(2) which provides that "the seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee for the buyer. The only way to explain this inconsistency is by construing it with G. C. § 8436 whereby the unpaid seller loses his lien when he delivers the goods without reserving the property in the goods or the right to the possession thereof. Hence G. C. § 8434

sub. 2 can only apply when the seller has never parted with possession, but has retained possession of the goods as bailee for the buyer, title having passed to the buyer.

(20)

A left with B certain electrotype plates to be used in printing some circulars. The circulars were printed by B who used the electrotype plates in doing the work. B delivered the circulars to A but A failed to pay for the same and later made an assignment for the benefit of creditors. His assignee brought replevin against B for the plates. B claimed a lien on the plates for the amount of his claim for printing the circulars.

Has he such a lien? Explain your answer.

No.

A bailee's lien for work and expense put on an article left with him for the purpose in the line of his avocation does not apply to instruments left with him to work with, as electrotype plates left with a printer to print from. Wrightson v. Bettinger, 2 C. C. 381, 1 C. D. 543.

There is nothing in the facts here to show that there was a contract between the parties whereby B would have a lien on the plates. The defendant must therefore rest his claim upon the existence of a lien at common law, hence the question is, "Was there a lien at common law?"

It is undoubtedly true that when a person, from the nature of his occupation, receives, and is at trouble or expense about the personal property of another, he has a lien upon, and may retain it until his contract price, or his reasonable charges therefore, are paid. And under this doctrine of the law, if (A) had also furnished the paper on which (B) had printed the circulars from these plates, (B) would have had a lien upon the paper and the printing done thereon, until he was paid for the work.

But there is no authority which extends this rule to a case like the one under consideration i. e., that where an article or instrument is delivered by the owner thereof to another person, with which instrument the latter is to perform work for the former, that the person so using it is entitled to a lien on the instrument itself. (Idem, at p. 544).

(21)

What degree of care must a bailee of property, without reward, exercise?

He must exercise as much care as he ordinarily uses in keeping his own property, of the same kind. He should also keep the property with such degree of care as is reasonable, with reference to the nature of the goods, and the particular circumstances of the bailment. Griffith v. Zipperwick, 28 O.S. 388; Savin v. Butler, 19 App. 68, 73.

(22)

B, a slaughter-house company, discovered a lot of hogs in its pen without an owner, and no owner was found after diligent search. After keeping the hogs a few days, they sold them to a butcher who slaughtered them and then later refused to pay B for them, claiming that B had no right or title to them. Is this defense good?

No.

Live stock left in the custody of a company, whose business it is to furnish temporary accommodations for the same, may be sold by such company when no owner can be found, and from the perishable nature of the property a necessity for sale arises.

If the purchaser, with knowledge of all the facts, buys upon a contract that the money shall be held by the vendor for the benefit of the owner he cannot, after obtaining the property, refuse to pay on the ground that such vendor had no title to the property.

The law relating to strays does not apply to hogs left by some one unknown in the pens of a company engaged in the business of receiving and caring for live stock brought to market. Trustees v. Brighton Stock Yards Co., 27 O.S. 435.

(23)

Smith buys a Ford automobile and gives a mortgage back to the company for part of the purchase price. The mortgage was duly recorded. Shortly thereafter and before the mortgage was paid the automobile was in an accident. Smith takes it to the Cleveland Garage to have certain repairs made on it, and when the work is completed he is unable to pay either the repair bill or the balance due on the mortgage, and the car will not bring enough to pay for both claims. Which creditor has the preference?

The mortgagee.

Where chattel property is incumbered by a valid chattel mortgage, properly executed and filed, according to the statutes of Ohio in such cases made and provided, such record is constructive notice to persons who thereafter perform labor or furnish materials in repairing such chattel property, and the common-law lien of such artisan is subordinate to the lien of the mortgage thereon. Metropolitan Securities Co. v. Orlow, 107 O.S. 583.

(24)

B sues to recover for loss of merchandise destroyed in transit due to a collision, and which merchandise, consisting of jewelry, was shipped as baggage unknown to the carrier. Is the carrier liable for the full extent of the loss, and why?

No.

A carrier of passengers is not liable for the loss of a package containing merchandise, shipped over its line by a passenger under the guise of baggage, where neither the carrier nor its proper agent has actual knowledge of the contents of the package, and the loss is occasioned by ordinary negligence and not that gross neglect of duty which amounts to wilfulness, and evinces a reckless disregard of the rights of others.

Where, in such case, the cause of a loss of the merchandise was a collision between trains occasioned by the engineer of a helping engine misreading his watch as three o'clock when it was in fact three-fifteen o'clock, thus giving but six minutes to reach a meeting point where twenty-one minutes were required, the mistake being brought about by the engineer holding the stem of his watch—an open-face movement in a hunting case—horizontally instead of perpendicularly when noting the time, the company will not be liable, the negligence not being gross negligence within the meaning of the preceding paragraph. Railroad v. Bowler & Burdick Co., 63 O.S. 274.

(25)

The Cleveland Warehouse Company receives grain from John Jones to mix with other grain, having the option to either pay for the grain or to return a similar amount of mixed grain after they have received the grain, but before intermingling it with the other grain a receiver on behalf of the creditors takes charge of the warehouse. Does Jones have a preferred claim against the receiver for the grain, or must he come in as a general creditor? Why?

Jones must come in as a general creditor.

Plaintiff deposited with a firm of warehousemen wheat, receiving the following receipt: "New London, Ohio, August 18, 1891. Received in store from A. Gibb, 403 45-60 bushels of wheat which we store at ½ cents per bushel per month, and we are to have at the market price when called for, unless we prefer to furnish the grain. Subject to the order of A. Gibb, on the surrender of this receipt and the payment of charges. To be kept insured by us, No. 66. Dean & Lilley." Said warehouseman kept the wheat in store for plaintiff, subject to his order, for some time, until a receiver was appointed for said firm of warehousemen. Plaintiff afterwards called on said receiver for his wheat, which the receiver refused to deliver. HELD, following CHASE v. WASHBURN, 1 O.S. 244, that where a warehouseman receives wheat, and by the consent of the owner, or in accordance with the custom of trade, mixes the wheat in his warehouse, and with the understanding that he is to retain or ship the same for sale on his own account, at pleasure, and, on presentation of the warehouse receipt, is either

to pay the market price thereof in money, or re-deliver the wheat, or other wheat in place of it, the transaction is not a bailment, but a sale, and the property passes to the depositary. Alex. Gibbs v. E. E. Townsend, Rec'r, etc., 9 C.C. 409, 4 C.D. 96 (aff 55 O.S. 652 mem.).

(26)

State the difference between a mortgage conveyance of goods and a pledge of goods.

The difference between a mortgage conveyance of goods to secure a debt, and the pledge of goods for the like purposes, is this: Where goods are mortgaged, the title passes conditionally to the mortgagee, and if not redeemed at the time stipulated by the payment of the debt, the title becomes complete and absolute in him at law; but a court, on its equity side, may compel a redemption of goods and an account, even though the parties agree that the mortgagee shall have the property mortgaged if the debt be not paid. If there is a pledge, a special property only passes to the pledgee at law, the general property still remaining in the pledgor, as will be seen hereafter by the text. Swan's Treatise, p. 437-438, 26th Ed. 1926.

In a pledge, possession passes, but title does not, while in a chattel mortgage, title passes, but possession need not. In a pledge, the property may be sold on the non-payment of the debt and only so much of the proceeds as will pay the debt passes to the pledgee. In a mortgage at common law, the property passes to the mortgagee on the non-payment of the debt. Hale on Bailments, p. 101.

(27)

Farmer Hay took 60 bushels of wheat to Jones' warehouse for storage. It was agreed that the wheat might be placed in a bin with other wheat to be sold and that upon demand Jones would deliver to Hay 60 bushels of wheat of the same grade and quality as that left for storage. By an unavoidable accident the warehouse was destroyed by fire. Hay demanded pay for the wheat which Jones refused on the ground that the wheat was left for storage and that he being without fault, Hay must bear the loss. Is Jones liable? Give reasons for answer.

Yes.

In case of an irregular deposit or mutuum, where the obligation imposed upon the depositary or mutuary, is to re-deliver, not the specific thing furnished, but another article of the same kind and value; or, where the depositary has the OPTION to return the SPECIFIC ARTICLE received, or another of the SAME KIND AND VALUE, in either case the property passes to the depositary as fully

as in a case of ordinary sale or exchange; and the risk of loss by accident, follows the control or dominion of the property. Chase v. Washburn, 1 O.S. 244.

The answer might have been otherwise had Jones agreed to re-deliver to Hay from the particular bin where Hay's wheat was placed, and to retain at all times sufficient wheat in said bin to make good this agreement.

(28)

A leased his motor truck to B for three months to be used in hauling coal. After using the truck one month B sold his business and then leased the truck to C for other purposes. C used the truck for a week when it was destroyed by fire through C's negligence. A sued B for conversion of the truck. Can A recover? Give reasons for answer.

Yes.

Conversion is any distinct act of dominion wrongfully exerted over one's property in denial of his rights or inconsistent with it. City Loan & Savings Co. v. Lewis Dickison, 19 N.P.(N.S.) 216, 26 D. 593.

The bailee must respect the limitations on his use imposed by the contract of hiring; his use of the thing is limited strictly to the time, purpose, and manner therein set out. He therefore has no right to use the thing during a longer time, or for a different purpose, or in another manner from that specified by the bailment contract. * * * Where the bailee transcends the bailment contract, along any of the lines indicated, there can be no question that he has committed an actionable wrong, and that he can be held liable for any damages proximately connected with his breach. Dobie on Bailments, § 47.

(29)

Jones, intending to move, delivered his household goods to the X Railroad Co. for transportation. The goods were placed in a freight car which was left standing in the railroad yards. A neighboring river was rising because of unusually heavy cloudburst and there was reason to believe that the water would reach the freight yards. The X Railroad Co. made no attempt to clear the yards and the property was flooded and Jones' goods destroyed. Jones sued the X Railroad Co. to recover for the loss of the goods. The company defended on the ground that the loss was the result of an act of God. Can Jones recover? Give reasons for answer.

Yes.

Where there has been antecedent delay in shipment, followed by an unprecedented physical event comprising

what is known as an "act of God,'" if the carrier has failed to exercise due care after discovery of such an event and its impending perils, the carrier will be liable, if damage ensues because of such neglect. T. & O. C. Ry. v. Kibler & Co., 97 O.S. 262.

(30)

Smith and Jones are both plumbers engaged in business in Cleveland and are good friends. Each owns an automobile truck for use in his business. Smith's truck became damaged and his friend Jones told him he was welcome to use the Jones truck for the day as Jones was giving his employes a picnic and would not need it. Smith accepted this offer and in delivering merchandise with the Jones truck collided with the automobile of Brown. The negligence of both Smith and Brown concurred in causing the accident. Jones sued Brown to recover for the damage to his truck caused by the collision. Brown defended on the ground of contributory negligence. Can Jones recover? Give reasons in full.

Yes.

The owner of property in the hands of a bailee may recover from a third person damages caused to such property by the negligence of the third person, even though the bailee be guilty of contributory negligence in the handling of the property, and even if the bailee, in an action brought by him, might be met with the defense of contributory negligence. Gfell v. Hardware Co., 10 App. 427.

The bailee does not stand in the place of the bailor; he does not represent him in such a relation as would render the bailor liable for his negligent acts, or for the negligent acts of his servants or agents; and so, while in an action brought by the bailee against third parties for the injuries to the property, the third party may defend in the action upon the ground of contributory negligence upon the part of the bailee, his servants or agents, in an action by the bailor who is the owner of the property, against a third party for injury to the bailment, the negligence of the bailee, or his servants or agents, would be no defense and would not prevent a recovery for the reason that such negligence is not imputable to the bailor. Van Zile on Bailments, § 130, cited in 10 App. 430, supra.

(31)

A had for several weeks gone daily to a small bathing house at a beach and deposited his watch at the office and received a metal check for it from the manager before bathing. The watch was of peculiar design and the manager of the bath house had talked with A on several occasions about its unusual appearance. On the day in question A went to the bath house and as usual deposited his watch with the

manager and received a metal check in return. He put his check in his vest pocket and disrobed and hung his clothes in the bath room. While he was swimming, B, another bather, entered the bath room and took the check from A's clothes and substituted another check. B presented A's check to the bath manager and was given A's watch and absconded with it. A, on finishing his bath, presented the check he found in his clothes to the bath manager and was offered some articles of little value, which he refused. A sued the proprietor of the bath house for the value of his watch. Is the proprietor liable? Give reasons in full.

Yes.

A bathhouse proprietor, in whose custody clothing or other articles are deposited temporarily as an incident to his general business is liable as an ordinary bailee for hire for any loss resulting from ordinary negligence.

Delivery of property to the wrong person, renders the keeper of a bathhouse liable where the custodian knew both the bailor and the property, although the property was delivered to the person presenting the check given the bailor who had left the check where it might easily be stolen. 6 C.J. 1125, § 64 (d), citing, Tombler v. Kelling, 60 Ark 62, 27 L.R.A. 502.

(32)

(a) What is a Common Carrier?

(b) How far can a common carrier of goods limit by special contract his liability for damages resulting from his own negligence?

(a) A common carrier is one that undertakes for hire or reward to carry, or cause to be carried, goods for all persons indifferently who may choose to employ him, from one place to another. Express Co. v. Backman, 28 O.S. 144; Celina Tel. Co. v. Mutl. Tel. Co., 102 O.S. 487, 492.

(b) It is true that in Ohio, as elsewhere, in cases where the loss was not occasioned by the willful act or negligence of the carrier, an agreement fixing the amount of recovery in case of loss, entered into in consideration of a reduced freight rate, has been upheld. Such was the case of B. & O. Ry. v. Hubbard, 72 O.S. 302, where the court pointed out that the provision in that case was not a stipulation to exempt from liability for negligence. The same principle is applied in Pennsylvania Co. v. Shearer, 75 O.S. 249. But we hold that the doctrine of these cases does not apply where the loss is occasioned by such wilful act or gross negligence of the carrier as amounts to a conversion by him, and where there was no reduced freight rate granted as a consideration for the stipulation. N. Y. C. & St. L. Ry. v. Supply Co., 11 App. 196, 199, 200.

(33)

(a) What is a pledge?
(b) What are the rights and duties of finders of personal property?

(a) A pledge, pignus or pawn is a bailment to secure the payment of a debt, or the performance of an engagement, accompanied by a power of sale in case of default. Dobie on Bailment, § 70.

A pledge of personal property is a security for some debt or engagement. Kraay v. Gibson, 2 N.P.(N.S.) 537.

(b) By the general rule of the common law one who finds and appropriates a lost chattel not buried in or attached to the soil acquires the title thereto and the right to possession thereof against all the world but the true owner. 25 C.J. 1136, § 3-2.

The finder of lost goods is entitled to recover from the owner his necessary and reasonable expenses incurred in the successful recovery and preservation of the goods, and perhaps for his time and trouble, but he has no lien therefor, and he cannot pay himself for his expense and trouble by using the property for that purpose. 25 C.J. 1140, § 14.

The finder may protect his rights by an action against anyone who infringes them. At common law he has a special property in the thing found sufficient to enable him to maintain trover for its conversion against anyone except the true owner. 25 C.J. § 15, A. 1.

The finder of a lost chattel should restore it to its owner, and generally in the manner provided by statute. It seems that the finder is bound to give to one who claims as owner a fair and just opportunity, dependent on the circumstances of the case, to inspect the property found for the purpose of identification. 25 C.J. 1139, 1140, § 12. A.

(34)

(a) What is a bill of lading?
(b) What is "Right of stoppage in transitu"?

(a) A bill of lading issued by a carrier is at the same time both a receipt for the goods delivered to the carrier and also a contract containing the terms of the agreement for the transportation of the goods. Dobie on Bailment, p. 196.

A written acknowledgment of the receipt of certain goods and an agreement for a consideration to transport and to deliver the same at a specified place to a person therein named or his order. Bouvier's Law Dictionary, Baldwin's Revision.

By the rules of the common law, bills of lading are regarded as symbols of the property therein described. Emery's Sons v. Irving National Bank, 25 O.S. 360.

(b) The right of stoppage in transitu is said to be derived from the right of revendication which exists of the civil law; and it is said to be an extension of a rule that either party may withhold performance if the adversary party is unable to perform. It is an extension of the vendor's lien by which such lien is made applicable to cases where the goods are in transitu in the hands of a common carrier. Benedict v. Schaettle, 12 O.S. 515.

(35)

Define "Innkeeper" and state briefly what at common law was an innkeeper's liability and what his rights as to personal property of his guests.

An inkeeper or hotel keeper is one who holds himself out to the public as ready to entertain travelers or transients as guests for a compensation, furnishing food and lodging or lodging alone. A restaurant is not an inn, because it furnishes only food. A lodging house is not an inn, because the keeper is not bound to entertain any who apply, and makes a special contract with each. An inkeeper, as to some of his permanent guests, may be rather a lodging-house keeper or boarding-house keeper than strictly an innkeeper. A steamer providing lodging and food for passengers has been treated as to those so entertained as a floating inn, but there is strong authority to the contrary. A sleeping car, on the other hand, is held not to be an inn. These distinctions are very nice and not always satisfactory. Huffcut, p. 105.

At common law an innkeeper is absolutely liable for the loss of his guests' goods in the inn, unless such loss was due to an act of God, the public enemy, or to the fault of the guest. He is thus practically an insurer of the safety of the goods,—and especially against theft,—a liability which does not attach to bailees generally. This rule originated in early times when robbers infested the routes of travel, and was intended to protect the guest from collusion between them and the innkeepers. Huffcut, p. 106.

At common law an innkeeper is liable for the goods of the guest lost in the inn, unless the loss has been caused by act of God, or of a public enemy, or by fault of the owner. Beale on Innkeepers, § 185; Palace Hotel Co. v. Medart, 87 O.S. 130, 134.

Furthermore an innkeeper is entitled at common law to a lien upon the baggage and other property of the guest brought by him into the hotel, and is entitled to detain any property brought into the hotel by the guest as security for the payment of an amount due by the guest for lodging, board and accommodations furnished. Thoma v. Remington Typewriter Co., 11 C.C.(N.S.) 174, 175.

(36)

What is a depositary and what are his rights and duties as to the thing deposited?

A depositary is a person entrusted with anything by another for safekeeping; a trustee; one to whom goods are bailed to be held without recompense.

In the law of bailment, the person with whom a thing is deposited by another, to be kept for the depositor or bailor, and returned upon demand, without a recompense. Bouvier's Law Dictionary, Baldwin's Revision.

In case of a deposit of property, to be kept by the bailee without reward and return to the depositor on demand, the law holds such a bailee liable only for losses arising from his GROSS NEGLIGENCE.

Good faith requires, generally, that such a bailee should keep the goods entrusted to him, with as much care as he ordinarily keeps his own, of the same kind. And he should also keep them with such degree of care as is reasonable, with reference to the nature of the goods, and the particular circumstances of the bailment. Griffith v. Zipperwick & Lodge, 28 O.S. 388.

(37)

What remedies has the Bailor, where a tort has been committed by the Bailee with respect to the subject-matter of the bailment?

If the bailee uses the property bailed for purposes variant from those for which, by the contract of bailment, they were to be used, this constitutes a conversion, and action is maintainable therefore.

Where personal property has been wrongfully converted by the bailee, the bailor is entitled to recover his specific property or its value, and cannot be compelled to accept other property of the same kind and of equal value, in lieu of that which was converted, although of course there can be no doubt that, if the bailee of personal property sells it in violation of his authority, the owner may ratify the transaction and demand the proceeds of the sale. 3 R.C.L. p. 112, § 35.

In Ohio the recovery of specific chattel property is accomplished by means of an action in replevin. G.C. § 12051.

(38)

Hobbs borrows $10 from Smith, a pawnbroker, and leaves his watch as security for the loan which is to be paid in 30 days. Within a week after the loan is made, Smith sells the watch to Jones by representing that the watch was new and not held as collateral. Upon the due date of the loan Hobbs tenders the full amount due Smith and then discovers that the watch has been sold to Jones. (a) Can

Hobbs maintain an action against Jones? (b) If so, would it be for money or in replevin? State reasons. Be brief!

(a) No.

(b) Hobbs cannot maintain an action against Jones in Ohio, under the above set of facts, although the rule appears to be otherwise in many foreign jurisdictions. The bailor or owner having clothed B with the indicia of title is thereby estopped from denying the authority of B to transfer title. The rule therefore that one may transfer to another only such title as he, himself has, does not apply in this case.

That a bailor has, ordinarily, a remedy against a person who has converted his property to his own use, is not denied. Roland v. Gundy, 5 O. 202.

But where a bailee, in violation of his trust, sells the property of the bailor, and applies the proceeds in payment of his (the bailee's) debt to a third person, who was ignorant of the breach of trust, the bailor cannot maintain, against such third person, as an action for money had and received. Thorne v. Bank, 37 O.S. 254, 260, 261.

(39)

The Blank Co. shipped 100 barrels of sugar from Cleveland to its agent at Columbus. The Railroad Co. accepted the shipment and loaded the goods in a freight car. The car was broken into by thieves while in transit on the railroad and 10 barrels of sugar stolen. The balance of 90 barrels arrived in good condition at Columbus and the Blank Co. was notified to claim the goods but neglected to do so. The Railroad Co. placed the 90 barrels in their storage house and advised the Blank Co. to call for them. Thirty days later thieves killed the railroad warehouse watchman who was guarding the sugar and stole the 90 barrels. The Blank Co. sues the railroad. In the first cause of action it seeks to recover for the ten barrels stolen while in transit and in a second cause of action seeks to recover for 90 barrels stolen from the storage house. What should be the decision of the court? State reasons. Be brief!

The Blank Co. should recover for the 10 barrels, but not for the 90 barrels.

A common carrier, except where limited by contract, has obligations imposed by the common law which make it an insurer of the goods against all losses, except those arising from the act of God, the public enemy, the conduct of the shipper, the inherent nature of the goods, or, as is held in some cases, from the act or mandate of public authority. Railroad v. O'Donnell, 49 O.S. 489, 500; Railway v. Myers & Patty Co., 4 App. 494.

In the absence of both contract and statute, to the contrary, the liability of a railroad company, as a common car-

rier, continues until notice to the consignee of the arrival of his goods, and a reasonable time during business hours after receipt of notice, to inspect and remove them; unless he is unknown, absent, or cannot be found, in which cases the goods may be stored. Railroad v. Hatch, 52 O.S. 408.

As a general rule, when the carrier has done all that the law requires toward effecting a delivery of the property, but is unable to accomplish it and the property is so necessarily continued in his possession, his obligation becomes that of a depository only. He is no longer an insurer of the property, and may show that it was lost without his fault or negligence, and thereby exonerate himself from liability. Railroad v. O'Donnell, 49 O.S. 489, 496.

(40)

A hotel guest left his room, leaving the key at the desk. Upon his return and before checking out, he discovered his dress suit valued at $100 had been stolen from the room. He sues the hotel and at the trial proves the value of the suit and gives testimony himself as to the circumstances of the theft. At the close of plaintiff's case counsel for the hotel moves for a judgment on the ground that no testimony had been offered to show any negligence on the part of the hotel. How should the court rule? State reasons. Be brief!

The court should rule for the plaintiff.

In a suit by a guest against an innkeeper for damages for the loss of ordinary wearing apparel and personal effects left by him in his room, the key thereof having been delivered into the custody of the innkeeper, it is not necessary as a part of his case in chief to show that such loss was occasioned by the fault or negligence of the innkeeper. Proof of such loss by the guest makes out a PRIMA FACIE case of liability upon the part of the innkeeper, and R.S. § 4427a, now G.C. § 5983, does not change the rule of the common law in this regard. Palace Hotel Co. v. Medart, 87 O.S. 130.

(41)

A salesman brings his employer's samples into a hotel to show to customers. A few days after his arrival, the salesman is discharged by his employer and the employer so advises the hotel. Thereupon the salesman advises the hotel that he is going into business for himself and pays his account up to date but continues to live at the hotel and show the same samples to purchasers. The salesman later leaves, owing the hotel for lodging and the hotel seizes the samples and refuses to surrender them until the bill is paid. The bill is not paid. The salesman's former employer, who is owner of the samples, brings a replevin action

against the hotel to recover the samples. Who should prevail? State reasons. Be brief.

The hotel.

G.C. § 5984 provides: "Such innkeeper shall have a lien on the baggage and other property in and about such inn belonging to or UNDER THE CONTROL OF HIS GUESTS or boarders for the proper charges due him for their accommodation, etc., * * *.

The lien of an innkeeper attaches to a typewriter, left at the inn by a guest who departed without paying his bill, notwithstanding the guest had no title to the machine, and had obtained title to it by false pretenses. Thoma v. Remington Typewriter Co., 11 C.C. N.S. 174, 20 C.D. 691.

(42)

Brown owed Allen $500. Allen agreed to stock Brown's mill with wheat which Brown was to make into flour and Allen would then sell it at the prevailing market price. The proceeds were to be used as follows—first the value of the wheat in bulk was to be deducted by Allen; then Allen would deduct the $500, cancel the debt of Brown and give Brown one-half the remaining money. Shortly after Allen delivered the wheat, one of Brown's creditors attached the entire mill and contents. Allen then applies to the court for a discharge of the attachment so far as the wheat is concerned. How should court rule? State reasons. Be brief.

The court should grant a discharge of the attachment.

A contract by which one party agrees to furnish wheat to stock a mill, and the other party, with the money advanced by the first to purchase the wheat, convert it into flour, and, after deducting 2½ per cent. and the original cost of the wheat, to receive the avails of the sale of the flour, does not constitute a partnership.

In such case, the wheat purchased is the property of the person furnishing the capital, and is only held by the other as bailee; and, if levied on as his property, may be replevied at the suit of the person advancing the capital. Johnson v. Miller, 16 O. 431.

(43)

Where wheat was sent by A to a warehouse to be stored, and the warehouseman mixed it with his own of the same grade and quality and sold from common mass but never more than his own quantity, was the transaction a sale or a bailment?

The transaction was a bailment for title to the grain, (fungible goods), remained in A, as to his proportionate share of the entire mass.

A warehouseman received wheat from farmers, and

stored it in his warehouse, giving receipts for it, in the following form:

"Big Prairie, Sept. 9, '82.

"Rec'd of George Leyda, 173 bu. 20-60 one hundred & seventy-three bu. twenty lbs. of No. 2 wheat. Owner of stored wheat at their own risk.

"W. H. Easterday & Bro."

Nothing was charged for storage, and no time was fixed during which the wheat should remain in store, except that it was to be left until the person storing it should be ready to sell. There was no agreement that the wheat should be mixed with other wheat, or, that the warehouseman might sell, ship, or consume it. When it was stored, the warehouseman mixed it with wheat of his own, of the same grade and quality, and sold from the common mass, but never more than his own quantity, always reserving enough to return to each depositor his proper quantity. Held:

The transaction with each depositor constituted a bailment. O'Dell v. Leyda, 46 O.S. 244.

(44)

W, the keeper of a gambling house, closed his night's business at 2 A. M.; having a sum of money upon his person, and not being ready to retire for the night, visited an inn for the purpose of depositing his money for safekeeping, and found the inn in charge of the night clerk; inquired if he could have a lodging for the night; was told that he could; stated that he was not ready to retire for the night, but left his money with the clerk. The clerk told him he would reserve a room. W did not register but returned in three hours to have a room assigned to him. In the meantime the clerk had left with the money. Is the innkeeper liable?

No.

W was not a guest of the inn at the time he deposited his money with the clerk, and the innkeeper is not liable for the loss.

To entitle a person visiting an inn to be treated as a guest, and to hold the innkeeper responsible for money deposited with him for safekeeping, it must appear that such visit was for the purposes which the common law recognizes as the purposes for which inns are kept; and where such visit is made by one who does not require the present entertainment or accomodations of such inn, but whose purpose is simply to deposit his money for safekeeping, he is not a guest of the inn and cannot hold the proprietor to an innkeeper's liability for the loss of his money. Arcade Hotel Co. v. Wiatt, 44 O.S. 32.

(45)

An impostor assuming the name of J orders jewelry to be shipped to J, and the shipper believing that J, whose standing is good, is to be the buyer, ships them, and the impostor obtains the goods from the carrier, who knew that there was a dealer named J but believed the impostor also to be named J, and to be the one intended. The jeweler sues the carrier.

Can he recover?

Yes.

The obligation of a common carrier of merchandise is to carry to the destination and deliver to the consignee named in the address, unless prevented by the act of God or the public enemy; and delivery to a wrong person, not induced by some act or representation of the consignor, is not excused by any degree of care which the carrier may exercise. Oskamp, Nolting & Co. v. The Southern Express Co., 61 O.S. 341.

(46)

Plaintiff for several consecutive weeks became a guest of a hotel. His business calling him to adjacent cities, he checked out each week with the expectation of returning at the end of the week as a guest. Each week the plaintiff returned to the hotel, staying as a guest for three or four days. The hotel was provided with special storage rooms for customers who left their baggage until their return. By arrangement with an authorized employe, plaintiff left his trunk and contents for storage in such room until his weekly return, and obtained a receipt therefor. On one occasion, after having been absent for three or four days, plaintiff returned, presented his receipt and was informed by the hotel company that the trunk and contents had been lost. Plaintiff sues the hotel company for value of trunk and contents. Can he recover?

Yes.

The facts stated make this a bailment for mutual benefit, based upon a sufficient consideration, and the bailee was required to use ordinary care for the safekeeping of the goods. Hotel Statler Co., Inc., v. Safier, 103 O.S. 638.

Judge Story in his work on bailments (9 Ed., p. 27, states the principle thus: "When the bailment is reciprocally beneficial to both parties, the law requires ORDINARY diligence on the part of the bailee, and makes him responsible for ordinary neglect." Manifestly the bailment, in a case like the present, is of the latter class, for, while the customer pays nothing directly, or EO NOMINE, for the safekeeping of his effects, the dealer receives his compensation in the profits of the trade of which the bailment is a necessary incident. Supra, p. 643.

(47)

A gives some shares of bank stock as collateral security for payment of a note; the note is partly paid and a new note is then executed for the balance. Before the note is paid, A becomes insolvent and goes into bankruptcy.

Who is entitled to the bank stock?

The pledgee.

Where part of a promissory note is paid, and a note in renewal is executed for the balance, a pledge given as collateral security when the first note was executed, will stand as collateral security for the balance of the debt embraced in the new note, in the absence of any agreement to the contrary. Dayton National Bank v. Merchant's National Bank, 37 O.S. 208.

(48)

Ellis and Pound, on Nov. 3, 1927, executed a written contract as follows:

"Nov. 3, 1927.

"Eli Ellis this day sold to Ezra Pound 100 sheep weighing 10,000 pounds at 10 cts., to be paid for when taken back by Ellis in 1928. Said Pound sells said sheep back to Ellis, to be delivered to him between May 15 and June 15, 1928, at price of 15 cts. per pound.

(Signed) "Eli Ellis,
"Ezra Pound."

In the night season of May 13, 1928, the sheep for safekeeping were confined in a closed shed on the premises of Pound and while so enclosed the shed was struck by lightning and burned and all the sheep killed. (a) Did the above transaction constitute a bailment or a sale? Give brief reasons. (b) Upon which of the two parties, Ellis or Pound, should the loss fall? Give brief reasons.

(a) Sale.

(b) Pound.

A contract for the sale by A to B of twenty-two cattle, of a specified aggregate weight and at a named price per pound, payment not to be made for some months, during which time the cattle were to be fed by B and then re-sold to A at an increased price per pound, is not a bailment, nor is it an executory sale from A to B, but the sale is absolute and title passes, and loss from injury to the cattle while they are in possession of B, and before the time fixed for their re-sale to A, must be borne by B. Gills v. George, 8 C.C.(N.S.) 393, 18 C.D. 583.

(49)

A, the absolute owner of 1,000 bushels of wheat, residing in Sandusky county, Ohio, delivered it to B, a warehouseman of the same county, and thereupon B issued and

delivered to A a negotiable receipt for said wheat. Thereafter, C, a creditor of A, duly recovered a judgment against him for $500 and caused an execution to be issued to the sheriff of Sandusky county, who went to B's warehouse and attempted to seize the wheat therein to satisfy the execution. B resisted the sheriff and drove him from the warehouse. What are the respective rights of the parties involved in this situation? State reasons for your answer, confining them to three lines of your manuscript.

B had a right to resist the seizure of the wheat, because a warehouseman shall in no case be compelled to deliver up the actual possession of the goods until the receipt is surrendered to him or impounded by the court.

G.C. § 8481 provides: "If goods are delivered to a warehouseman by the owner or by a person whose act in conveying the title to them to a purchaser in good faith for value would bind the owner, and a nogotiable receipt is issued for them, they cannot thereafter, while in the possession of the warehouseman, be attached by garnishment or otherwise, or be levied upon under an execution, unless the receipt be first surrendered to the warehouseman, or its negotiation be enjoined. The warehouseman shall in no case be compelled to deliver up the actual possession of the goods until the receipt is surrendered to him or impounded by the court."

Constitutional Law

(Numbers in parenthesis refer to answers following.)

I. **ESTABLISHMENT AND AMENDMENT OF CONSTITUTIONS. (15, 38)**

Constitutional Law, 3 to 6.

See Answers 18, 19, Memory Work; O. Const. Art. 2, §§ 1a to 2, 16, Art. 16, §§ 1 to 3; 88 O.S. 61; 88 O.S. 473; 93 O.S. 1; 103 O.S. 306; 19 App. 107.

II. **CONSTRUCTION, OPERATION AND ENFORCEMENT OF PROVISIONS.**

A. Rules of Construction. (1, 20)

Constitutional Law, 9 to 14, 20 to 23.

5 O.S. 243; 46 O.S. 677; 88 O.S. 61; 93 O.S. 461; 95 O.S. 232; 104 O.S. 220; 117 O.S. 451; 27 App. 141.

B. Grant or Limitations of Power. (21a)

Constitutional Law, 15.

29 O.S. 102; 73 O.S. 183; 75 O.S. 1; 107 O.S. 341.

C. Operation as to Prior Laws.

Constitutional Law, 16.

89 O.S. 93; 1 O.F.D. 603.

D. Who Can Test Constitutionality.

Constitutional Law, 17.

44 O.S. 595; 50 O.S. 197; 113 O.S. 703; 23 App. 259.

E. Mandatory or Directory Provisions. (29)

Constitutional Law, 19.

34 O.S. 551, 562.

F. Presumptions in Favor of Constitutionality.

Constitutional Law, 24.

36 O.S. 639; 92 O.S. 215; 101 O.S. 437; 118 O.S. 25.

III. **LEGISLATIVE POWERS.**

A. Nature and Scope in General. (3, 12, 18, 20, 21b, 28)

Constitutional Law, 27.

O. Const. Art. 2; 1 O.S. 622; 63 O.S. 442; 66 O.S. 249, 253; 92 O.S. 215; 119 O.S. 117

B. Delegation of Powers. (10, 14)

Constitutional Law, 28 to 35.

38 O.S. 344; 97 O.S. 86; 115 O.S. 705; 17 App. 461; 14 N.P. (N.S.) 433; 27 N.P.(N.S.) 52; 7 O.F.D. 191.

[*References are to Bates' Compact Ohio Digest.*]

C. Encroachment on Judiciary. (9, 32)

Constitutional Law, 36 to 40.

54 O.S. 10; 73 O.S. 183; 95 O.S. 232; 97 O.S. 140, 143; 99 O.S. 269; 2 N.P.(N.S.) 221; 1 O.F.D. 233.

IV. EXECUTIVE POWERS. (4, 6)

Governor, 1 et seq.

O. Const. Art. 3; 66 O.S. 612; 100 O.S. 385; 108 O.S. 440.

V. JUDICIAL POWERS. (13, 20, 29, 30)

Constitutional Law, 43, 44.

See Ans. 14, Memory Work; O. Const. Art. 4; 102 O.S. 114; 104 O.S. 120; 112 O.S. 468; 116 O.S. 732; 117 O.S. 470; 118 O.S. 154; 118 O.S. 273.

VI. POLICE POWERS IN GENERAL. (35, 37)

Constitutional Law, 48, 49.

79 O.S. 174, 178; 99 O.S. 376; 100 O.S. 456; 116 O.S. 205; 118 O.S. 99; 26 App. 447.

VII. PERSONAL, CIVIL AND POLITICAL RIGHTS.

A. In General. (24, 26)

Constitutional Law, 52.

Bill of Rights, O. Const. Art. 1; 67 O.S. 197; 4 N.P.(N.S.) 481; 7 C.C.(N.S.) 608.

B. Personal Liberty and Security. (26)

Constitutional Law, 53; Habeas Corpus, 1 et seq.

62 O.S. 289; 81 O.S. 142; 16 C.C.(N.S.) 289.

C. Liberty to Contract, Contracts of Employment. (22)

Constitutional Law, 54, 55.

O. Const. Art. 1, § 1; 17 N.P. 487; 12 N.P.(N.S.) 1; 13 D. 342; 10 O.F.D. 274

D. Right to Acquire and Dispose of Property.

Constitutional Law, 56.

39 ~~OS. 236~~, 238; 39 O.S. 651; 55 O.S. 423.

E. Freedom of Speech and of the Press.

Constitutional Law, 57.

O. Const. Art. 1, § 11; 65 O.S. 414, 422; 80 O.S. 492.

F. Right of Assembly and Petition.

Constitutional Law, 58.

O. Const. Art. 1, § 3; 20 N.P.(N.S.) 241.

VIII. VESTED RIGHTS.

Constitutional Law, 62 to 65.

70 O.S. 207; 1 C.C. 88; 4 O.F.D. 86.

IX. OBLIGATIONS OF CONTRACTS.

A. Powers of States in General.

Constitutional Law, 67, 68.

104 O.S. 436; 3 O.F.D. 133.

B. Contracts of States and Municipalities. (8)

Constitutional Law, 71 to 77.

O. Const. Art. 1, § 2, Art. 13, §§ 1, 2, Art. 18, § 4; 98 O.S. 251; 118 O.S. 544; 25 N.P.(N.S.) 523; 12 O.F.D. 635.

C. Contracts of Individuals and Private Corporations. (8)

Constitutional Law, 80 to 84.

O. Const. Art. 2, § 28; 55 O.S. 93; 71 O.S. 273, 290; 92 O.S. 130; 22 N.P.(N.S.) 225

X. RETROSPECTIVE OR RETROACTIVE LAWS. (7)

Constitutional Law, 87 to 92.

O Const. Art. 2, § 28; 20 O.S. 362; 48 O.S. 89; 64 O.S. 39; 65 O.S. 313; 101 O.S. 387; 101 O.S. 162; 115 O.S. 709.

XI. EX POST FACTO LAWS.

Constitutional Law, 95 to 97.

39 O.S. 207; 91 O.S. 315; 25 App. 130; 11 D. Repr. 311.

XII. PRIVILEGES, CLASS LEGISLATION AND EQUAL PROTECTION OF LAWS.

A. Special or General Laws Defined.

Constitutional Law, 106 to 108.

O. Const. Art. 2, § 26; 6 O.S. 269; 54 O.S. 284; 66 O.S. 75, 78; 104 O.S. 384; 117 O.S. 285; 17 C.C. 86.

B. Conferring Corporate Powers; Personal Liability of Stockholders. (8)

Constitutional Law, 109, 110.

O. Const. Art. 13, §§ 1 to 3; 92 O.S. 115; 104 O.S. 436; 108 O.S. 41; 111 O.S. 139.

C. Classification of Municipalities. (27)

Constitutional Law, 111 to 113.

O. Const. Art. 13, § 6, Art. 18; 44 O.S. 247; 45 O.S. 63; 53 O.S. 400; 66 O.S. 75, 81; 100 O.S. 265; 110 O.S. 400.

D. Class Legislation.

Constitutional Law, 114 to 116.

O. Const. Art. 2, § 26; 57 O.S. 1, 22; 63 O.S. 202; 71 O.S. 151; 101 O.S. 437.

E. Privileges and Immunities of Citizens of the Several States.

Constitutional Law, 117.

28 O.S. 521; 72 O.S. 560, 574; 73 O.S. 16; 107 O.S. 352.

F. Licenses and License Tax. (11)

Constitutional Law, 118; Licenses, 4 to 20.

45 O.S. 63; 49 O.S. 536; 53 O.S. 660; 66 O.S. 249; 81 O.S. 142; 113 O.S. 347; 18 C.C.(N.S.) 488; 21 C.C.(N.S.) 173.

G. Uniform Operation.

Constitutional Law, 119 to 121.

O. Const. Art. 2, § 26; 66 O.S. 555; 67 O.S. 77; 72 O.S. 93; 92 O.S. 115; 21 C.C. 261; 12 N.P.(N.S.) 529.

H. Equal Protection of Laws.

Constitutional Law, 122.

O. Const. Art. 1, § 2; 53 O.S. 314; 108 O.S. 475; 7 App. 509.

I. Discrimination by Reason of Race, Color or Condition.

Civil Rights, 1 et seq; Constitutional Law, 123.

G.C.§ 12940; 61 O.S. 388; 17 C.C.(N.S.) 495; 13 N.P.(N.S.) 313.

J. Regulation of Trade or Business. (17, 18, 35, 36)

Constitutional Law, 124 to 128.

O. Const. Art. 2, §§ 34, 36; 28 O.S. 521; 58 O.S. 599; 67 O.S. 197; 77 O.S. 214; 116 O.S. 127.

XIII. DUE PROCESS OF LAW. (5, 7, 17, 23, 25, 34)

Constitutional Law, 131 to 141.

O. Const. Art. 1, §§ 5, 16; 84 O.S. 408, 422; 101 O.S. 162; 117 O.S. 102; 117 O.S. 114; 118 O.S. 487; 16 O.F.D. 134.

XIV. EMINENT DOMAIN.

Eminent Domain, 1 et seq.

G.C.§§ 3878, 3995 et seq, 9090; 11038 et seq; 22 O.S. 411; 93 O.S. 161; 119 O.S. 110; 7 O.F.D. 335.

XV. TAXING POWER OF U. S. AND STATE. (16, 19)

Taxation, 8 to 54.

O. Const. Art. 12; G.C.§§ 5320 et seq; 112 O.S. 166; 113 O.S. 52; 114 O.S. 479; 116 O.S. 1; 293 Fed. 448.

Definitions

CONSTITUTION.—The fundamental law of a state, directing the principles upon which the government is founded, and regulating the exercise of the sovereign powers, directing to what bodies or persons those powers shall be confided and the manner of their exercise. Bouvier's Law Dictionary, Baldwin's Revision.

POLICE POWER.—The power to govern men and things, extending to the protection of the lives, limbs, health, comfort, and quiet of all persons and the protection of all property within the state. Bouvier's Law Dictionary, Baldwin's Revision.

RETROSPECTIVE.—This word is usually applied to those acts of the legislature which are made to operate upon some subject, contract, or crime which existed before the passage of the acts; and they are therefore called retrospective laws. Bouvier's Law Dictionary, Baldwin's Revision.

EX POST FACTO LAW.—A law passed after the commission of the offence charged, which inflicts a greater punishment than was annexed to the crime at the time of commission, or which alters the situation of the accused to his disadvantage. Bouvier's Law Dictionary, Baldwin's Revision.

EMINENT DOMAIN.—The superior right of property subsisting in a sovereignty, by which private property may in certain cases be taken or its use controlled for the public benefit, without regard to the wishes of the owner. Bouvier's Law Dictionary, Baldwin's Revision.

GENERAL LAW.—Statutes which relate to persons and things as a class. Laws that are framed in general terms, restricted to no locality, and operating equally upon all of a group of objects which, have regard to the purpose of the legislation, are distinguished by characteristics sufficiently marked and important to make them a class by themselves. Bouvier's Law Dictionary, Baldwin's Revision.

OHIO STATE BAR EXAMINATIONS

QUESTIONS WITH ANSWERS

[*Arranged Chronologically.*]

(1)

The courts may eliminate parts of an act as unconstitutional and sustain and give effect to the remaining portion. Give exceptions to this rule. Explain.

"The court will not permit the unconstitutionality of a particular provision of a law to invalidate the entire law, if it is possible to separate the invalid provision from the other provisions without destroying or impairing their efficiency to attain the results evidently intended by the legislature that enacted them. Even when thus separable, the court will not hold the remainder of the law valid, if there is doubt whether the realization of the whole of its will being rendered impossible, the legislature would have desired the execution of a part only." (Willoughby, Constitutional Law of U. S. p. 17.)

"An entire act will not be held unconstitutional because part of a section is so, unless the void part is so important and so connected with the rest as to raise a presumption that the rest would not have been enacted without it." (State v. Ritchie, 97 O. S. 41, 119 N. E. 124).

By way of explanation:

In the above case, the court was construing the 3rd section of the act of the General Assembly of Ohio, passed March 21, 1917, 107 v. 132 entitled an act to provide a court of domestic relations for Lucas County, Ohio, and prescribing the jurisdiction of said court: It found that it was in conflict with Section 26, of Article II of the constitution of Ohio, in so far as it purported to confer jurisdiction upon that court to the exclusion of the jurisdiction conferred upon the common pleas court by the general laws of this state, but that it was valid as conferring jurisdiction concurrent with the jurisdiction of common pleas court.

Judge Donahue says in the opinion: Here we have the original act establishing a court of domestic relations in Lucas County. The establishment of this court was undoubtedly the main purpose and intent of the legislature. Undoubtedly the legislature would have passed this act and created this court even had it known that it could not confer jurisdiction upon it over these subjects to the exclusion of the jurisdiction of the common pleas court of that county.

While the jurisdiction of a court is not merely a minor detail in relation to its establishment, nevertheless this act does confer full and complete jurisdiction over the subject-matters mentioned therein. The entire act should not be held invalid merely, because the attempt to make that jur-

isdiction exclusive of the jurisdiction of the common pleas court of Lucas County is unconstitutional.

This act is unconstitutional insofar as it purports to confer such exclusive jurisdiction, but it is valid as conferring jurisdiction concurrent with the common pleas court of that county. (97 O. S. 41 at p. 50, 119 N. E. 124).

(2)

What procedure is required in combining the probate court with court of common pleas?

There shall be established in each county, a probate court, which shall be a court of record, open at all times, and holden by one judge elected by the electors of the county, who shall hold his office for the term of four years, and shall receive such compensation, payable out of county treasury, as shall be provided by law. Whenever ten per centum of the number of electors voting for governor at the next preceding election in any county having less than sixty thousand population as determined by the next preceding federal census, shall petition the judge of the court of common pleas of any such county not less than ninety days before any general election for county officers, the judge of the court of common pleas shall submit to the electors of such county the question of combining the probate court with the court of common pleas, and such courts shall be combined and shall be known as the court of common pleas in case a majority of the electors voting upon such question, vote in favor of such combination. Notice of such election shall be given in the same manner as for the election of county officers.

Elections may be had in the same manner for the separation of such courts, when once combined. (Ohio Constitution, Art. 4, § 7, as amended, Sept. 3, 1912).

(3)

Explain how a constitution is unlike a statute.

"A constitution differs from a statute or act of a legislature in three important particulars:

1. It is enacted by the whole people who are to be governed by it, instead of being enacted by their representatives sitting in a congress or legislature.

2. A constitution can be abrogated, repealed, or modified only by the power which created it, namely, the people; whereas a statute may be repealed or changed by the legislature.

3. The provisions of a constitution refer to the fundamental principles of government, or the establishment and guaranty of liberties, instead of being designed merely to regulate the conduct of individuals among themselves. But the tendency towards amplification, in modern constitu-

tions, derogates from the precision of this last distinction." (Black on Constitutional Law, 3rd Ed, p. 4).

(4)

What are the principal duties of the governor of the State?

The chief duties of the governor are as follows:—

1. To see that laws are propery executed;
2. To inform the legislature of condition of the state and recommend legislation;
3. To secure information from officers of executive department;
4. To appoint certain officers of the state and remove them for cause;
5. To act as commander in chief of the militia of the state;
6. To grant pardons and reprieves;
7. To convene the legislature in special session, and adjourn them;
8. To veto in certain cases." (Black on Constitutional Law, § 126).

These duties are provided for in the Ohio Constitution as follows:

"The supreme executive power of this state shall be vested in the governor." (Ohio Constitution, Art. 3, § 5).

"He may require information in writing, from the officers in the executive department, upon any subject relating to the duties of their respective offices; and shall see that the laws are faithfully executed." (Ohio Constitution, Art. 3, § 6).

"He shall communicate at every session, by message to the general assembly, the condition of the state, and recommend such legislation as he shall deem expedient." (Ohio Constitution, Art. 3, § 7).

"He shall have the power of appointment of certain officers." (Ohio Constitution, Art. 17, § 2; Art. 6, § 4 and Art. 7, § 3 etc.)

"The governor on extraordinary occasions, may convene the general assembly by proclamation and shall state in the proclamation the purpose for which such special session is called, and no other business shall be transacted at such special session except that named in the proclamation, or in any subsequent public proclamation, or message to the general assembly, issued by the governor during said special session, but the general assembly may provide for the expense of the session and other matter incidental thereto." (Ohio Constitution, Art. 3 § 8).

"In case of disagreement between the two houses, in respect to the time of adjournment, he shall have power to adjourn the general assembly to such time as he may think

fit, but not beyond the regular meetings thereof." (Ohio Constitution, Art. 3, § 9).

"He shall be commander-in-chief of the military and naval forces of the state, except when they shall be called into the service of the United States." (Ohio Constitution, Art. 3 § 10).

"He shall have power, after conviction, to grant reprieves, commutations and pardons, for all crimes and offenses except treason and cases of impeachment upon such conditions as he may think proper; subject, however, to such regulations, as to the manner of applying for pardons, as may be prescribed by law.

Upon conviction for treason, he may suspend the execution of the sentence, and report the case to the general assembly, at its next meeting, when the general assembly shall either pardon, commute the sentence, direct its execution, or grant a further reprieve. He shall communicate to the general assembly, at every regular session, each case of reprieve, commutation, or pardon granted stating the name and crime of the convict, the sentence, its date, and the date of the commutation, pardon, or reprieve, with his reasons therefore." (Ohio Constitution, Art. 3, § 11).

"There shall be a seal of the state, which shall be kept by the governor and used by him officially, and shall be called 'The Great Seal of the State of Ohio." (Ohio Constitution, Art. 3, § 12).

"All grants and commissions shall be issued in the name and by the authority of the State of Ohio; sealed with the great seal; signed by the governor, and countersigned by the secretary of State." (Ohio Constitution, Art 3, § 13).

"Every bill passed by the general assembly shall, before it becomes a law, be presented to the governor for his approval. If he approves, he shall sign it and thereupon it shall become a law and be filed with secretary of state. If he does not approve it, he shall return it with his objection in writing to the house in which it originated, which shall enter the objections at large on its journal, and may then reconsider the vote on its passage. If three-fifths of the members elected to that house vote to repass the bill, it shall be sent, with the objections of the governor to the other house, which may also reconsider the vote on its passage. If three-fifths of the members elected to that house vote to repass it, it shall become a law notwithstanding the objections of the governor, except that in no case shall a bill be repassed by a smaller vote than is required by the constitution on its original passage. In all such cases the vote of each house shall be determined by yeas and nays and the names of the members voting for and against the bill shall be entered upon the journal. If a bill shall not be returned by the governor within ten days, Sundays excepted, after being presented to him, it shall become a law in like manner as

if he had signed it, unless the general assembly by adjournment prevents its return; in which case, it shall become a law unless, within ten days after such adjournment, it shall be filed by him with his objections in writing, in the office of secretary of state. The governor may disapprove any item or items in any bill making an appropriation of money and the item or items so disapproved, shall be void, unless repassed in the manner herein prescribed for the repassage of a bill." (Ohio Constitution, Art. 2, § 16).

(5)

(a) What constitutes the taking of property by due process of law?

(b) What is not taking by due process of law?

(a) Property is taken by due process of law when it is taken for a public purpose and upon making just compensation to the owner.

"Private property shall ever be held inviolate but subservient to the public welfare. When taken in time of war, or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefore shall first be made in money, or first secured by a deposit of money, and such compensation shall be assessed by a jury, without deduction for benefit to any property of the owner." (Ohio Constitution, Art. 1, § 19).

(b) What amounts to a deprivation of property without due process of law is often difficult to determine, especially where the question relates to the property of a quasi-public corporation and the extent to which it may be subjected to public control. In consequence, the question as to whether property is taken without due process of law largely depends upon the nature of the particular case. As a general rule, however, there is a taking of property within the meaning of the constitutional provision, "nor shall private property be taken for public use, without just compensation," where the act involves an actual interference with or disturbance of property rights, as distinguished from injuries which are merely consequential or incidental, and as distinguished further from trivial or insignificant takings or interferences. It is not necessary, in order to render a statute vulnerable from a constitutional viewpoint, that it must in terms or in effect authorize an actual physical taking of the property or the thing itself, so long as it affects its free use and enjoyment, or the power of disposition at the will of the owner. Wherever the operation and effect of any general regulation is to extinguish or destroy that which by the law of the land is the property of any person,

so far as it has that effect, it is unconstitutional and void. And hence it is, while burdens and expenses may within reasonable and constitutional limits be imposed on property, constitutional limitations as to due process of law may, however, be violated by enactments in the exercise of the police power which impose unreasonable restraints and burdens on property and the enjoyment of property rights, or which work a practical confiscation of property or of its beneficial use. (6 Ruling Case Law, § 471).

(6)

Is the veto power of the president subject to any restriction?

If so, in what respect?

Yes, the veto power is subject to two restrictions:

(a) It must be exercised within ten days (Sundays excepted), if Congress remains in session that long.

(b) A veto may be overruled by the concurrent vote of two-thirds of both houses of congress. (Black's Constitutional Law, 3rd ed., p. 112, § 68).

"Every bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a law, be presented to the President of the United States; if he approves he shall sign it, but if not he shall return it, with his objections to that house in which it shall have originated, who shall enter the objections at large on their journal and proceed to reconsider it. If after such reconsideration two-thirds of that house shall agree to pass the bill, it shall be sent together with the objections to the other House, by which it shall likewise be reconsidered, and if approved by two-thirds of that house it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the President within ten days, (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner, as if he had signed it, unless the congress by their adjournment prevents its return, in which case it shall not be a law." (Constitution of U. S., Art. 1, § 7).

"Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States, and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill." (Constitution of U. S., Art. 1, § 7).

(7)

Dorothy Blair, an unmarried woman, was just 19 years old on February 1, 1923, when she became the owner of the Blair Building in Columbus, Ohio. On March 1, 1923, she entered into a written contract with Thomas Watson to sell and convey that property to him by good and sufficient warranty deed on September 1, 1923, if Watson desired to purchase from her on said date, - - -On July, 18, 1923, an Act of the General Assembly of Ohio became effective amending Section 8023 G. C. by changing the age of majority of females from 18 to 21 years. - - - On September 1, 1923, Watson notified Miss Blair that he desired to exercise his option for the purchase of the Blair Building. He tendered the agreed purchase price and demanded her deed. Miss Blair refused to convey, and Watson brought suit against her in the Common Pleas Court of Franklin County, Ohio, to compel specific performance of the agreement and he states her age in the petition—The defendant answers through her guardian admitting all the averments of the petition, but denying that she has sufficient capacity to execute said agreement by reason of non-age, and pleads the above mentioned Act of the General Assembly. The plaintiff by demurrer to the answer claims that this amendment to the law does not deprive him of his contract. The case is before you for decision. Judgment for whom, and why?

Judgment for the plaintiff and demurrer sustained.

Section 8023 of the General Code, raising the age of majority of all persons in the state to 21 years, is violative of the due process of law clause of the Federal Constitution, and also of Section 19 of Article 1, of the State Constitution making rights in private property inviolate, in so far as said act divests infant femes coverts of the right to convey property, the title to which vested in them prior to the effective date of said act, which was July 19, 1923. (Russell Gigger v. Frances Compton Kelly, 24 N. P. (N. S.) 499).

(8)

For more than 50 years the Constitution of Ohio has provided that corporations may be formed under general laws, but that all such laws may, from time to time, be altered or repealed—The amendment to Sec. 3, Article XIII of the Ohio constitution adopted September 3, 1912, imposes double liability upon the stockholders of Ohio corporations authorized to receive money on deposit. Such double liability had previously existed under the constitution of 1851, but had been removed by the constitutional amendment of November 23, 1903. An Ohio Banking Corporation was organized on March, 1, 1905, and conducted a banking business in Ohio until November 1, 1923, when it became insolvent and

was closed by the state supt. of banks. Action is brought against the stockholders of the bank to recover the liability sought to be created by the above-mentioned constitutional amendment of September 3, 1912. May that liability be enforced against stockholders who had purchased their stock prior to the adoption of that amendment, and at a time when the double liability did not prevail in Ohio? Give reason for your answer.

Yes.

The double liability of stockholders of banks imposed by the constitution of 1912, applies to those who purchased stock prior thereto as to debts thereafter incurred and is not void as impairing the obligation of contract, in view of the power reserved in their charters to alter or amend the same. (Allen v. Pontius, 15 App. 251).

The double liability of stockholders of banks imposed by the Constitution of 1912 (Article XIII, § 3) applies to holders of stock purchased when there was no such liability; this by reason of the power reserved to alter or repeal charters (Article XIII, § 3). (State v. Putnam County Banking Co., 22 N. P. (N. S.) 201, 31 D. 70).

(9)

In a suit by a taxpayer to enjoin the expenditure of public funds, a contract of the state of Ohio has been declared void by the court of appeals of Franklin county because of failure to advertise, and perpetual injunction has been granted. Thereafter the General Assembly of Ohio passed an act for the validation and ratification of certain state contracts including this contract in question. Thereupon the contracting parties are about to carry out the terms of the contract, when the taxpayer again sues to enjoin any payment of money on that contract. To the answer of the state of Ohio setting up the validating and ratifying act of the General Assembly the plaintiff interposes a demurrer. Judgment for whom, and why?

Judgment for the plaintiff.

"After final judgment that a public contract is void, a statute (as in 108 Ohio Laws) validating such contract is unconstitutional as an attempt to exercise judicial power." (Cowen v. State 101 O. S. 387, 129 N. E. 719).

"Where a judgment of the court of appeals is correct when rendered under the then statute as where it held a road contract to be void for failure to advertise 2 weeks for bids, a subsequent statute validating such contract will not authorize the supreme court to reverse such judgment on error, there being no error in the judgment below". (Cowen v. State, 101 O. S. 387, 129 N. E. 719.)

(10)

An Ohio city ordinance provides that it shall be unlawful for the driver or operator of any vehicle to permit his vehicle to stand within 50 feet of the entrance to the Majestic Theater on that side of the street in said city unless permission to stand within those limits on that street has been granted by the Supt. of the Majestic Theater Building Company, which controls that frontage on the street. The ordinance further provides that any person violating the same shall be deemed guilty of a misdemeanor and upon a conviction shall be fined in an amount not exceeding $25 for each offense. A licensed taxicab driver in that city is arrested charged with the violation of this ordinance, and at his trial he admits the violation, but challenges the constitutionality of the ordinance. You are the judge. How would you decide the case, and why?

The ordinance is unconstitutional, being an unlawful delegation of powers to an individual.

An ordinance forbidding vehicles to stand in front of a passenger station unless the person in supervision of such station has given permission is invalid as a delegation of legislative power. (Cincinnati v. Cook, 107 O. S. 223, 140 N. E. 655).

Such would also be violative of the "equal protection of law" guaranties of the state and federal constitutions.

Moreover, discrimination is not only permitted by the terms of this ordinance but is expressly authorized by the delegation of authority to the owner of the premises, whose ipse dixit determines the guilt or innocence of one who stops his vehicle or automobile in front of such premises. (Idem. at p 227).

(11)

Suppose the General Assembly of Ohio should pass a law authorizing municipal corporations to impose a license fee upon dealers in merchandise not manufactured in Ohio and forbidding an imposition of a license fee upon dealers in similar merchandise manufactured within the state.

Would the law be constitutional?

Give reason for your answer.

No.

It would be violative of Article I, § 8, clause 3 of the Federal Constitution which says, "Congress shall have power to regulate commerce with foreign nations, and among the several states" etc.

"A license tax imposed by a municipal corporation within one state upon the agent of a citizen of another state, for the privilege of selling or seeking to sell his goods in the former state, is a direct burden on interstate commerce; and therefore beyond the power of the state and

of the municipality thereof." (In Re Oscar Julius, 4 C. C. (N. S.) 604, 16 C. D. 423).

The negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce. Such commerce is not subject to state taxation, even though there be no discrimination between it, and domestic commerce. The sale in one state of goods manufactured in another state is interstate commerce and not subject to state taxation."—(Supra.)

(12)

Is a law limiting the number of character witnesses to ten in certain cases unconstitutional as a violation of the right to have compulsory attendance of witnesses?

No.

G. C. § 13662, limiting the number of character witnesses to ten in certain cases, does not violate Article I, § 10, giving the right to have compulsory attendance of witnesses. (State v. Stout, 49 O. S. 270, 30 N. E. 437).

On page 272, it is said: "the constitution should not receive a construction that would place in the hands of the accused persons an unlimited power to create expense and prolong trials indefinitely; nor, on the other hand, can a power be conceded to the legislature or the courts to unreasonably limit the witnesses an accused person may subpoena to maintain his defense. To concede such an authority would be to concede a power, the exercise of which, might substantially defeat the constitutional guaranty alluded to. The true rule, we think, will allow to the legislature the power to prescribe limits to this right, to have, at the public expense, witnesses to maintain his defense.

The legislature having the power to confine, within reasonable limits, the rights of an accused person in this respect, an act regulating the subject should not be declared unconstitutional, unless clearly unreasonable in its restrictions; which cannot be fairly said of the section under consideration. It allows to the defendant, at public expense, ten witnesses to establish his character, or reputation; a reasonable number it would seem; but if he desires more, it does not deny them, if they are produced at his own expense."

(13)

Can an action to foreclose a mechanic's lien be taken on appeal in Ohio from the court of common pleas to the court of appeals? Give reasons.

Yes.

The Ohio Constitution provides in Article IV, § 6, that all chancery cases are appealable; the court of appeals hav-

ing been given that appellate jurisdiction by the amendment to the constitution in 1912.

A mechanic's lien foreclosure is a chancery case, and therefore appealable to the court of appeals. (Hollowell v. Schraden, 96 O. S. 599, 118 N. E. 1083, reversing 9 App. 306, 26 C. C. (N. S.) 92. Hummer v. Parsons 111 O. S. 595; 146 N. E. 62).

A mechanic's lien is appealable although the lien itself is statutory, (Edgar v. Corwin, 8 App. 313, 29 O. C. A. 68).

It must be conceded that this right of mechanic's lien, though statutory, is based upon the equitable doctrine that one who contributes labor or furnishes material used in the construction of a building, and for which payment is not made, may perfect and have a direct lien upon such building and real property on which it is located. It doubtless was the legislative intent to make the procedure statutory, but the basic principle of the statute was, beyond all question, equitable in character as indicated especially by section 1, and as well by other parts of the original mechanic's lien act. The equitable principle upon which the act rested was not changed. (29 O. C. A. at p. 66, 67).

(14)

Can the legislative powers vested in the General Assembly of Ohio be delegated to any other body or officer?

No.

The legislative powers vested in the General Assembly can not be delegated to individuals or officers.

By Section I of Article II of the constitution, all legislative power is vested in the General Assembly, and this power cannot be delegated to individuals or officers. (Harmon v. State, 66 O. S. 249 at p. 253, 64 N. E. 117).

The legislative power of the state is vested in the General Assembly and cannot be delegated to any other body or to the people.

The entire legislative power of the state is vested in the General Assembly (Article II Section I of Ohio Constitution) and even without the limitation contained in Section 26, Article 2 it could not be delegated. It was held in "R. R. Co. v. Commissioners" 1 O. S. 77 at p. 87, that the power of the General Assembly to pass laws could not be delegated by them to any other body or to the people. (State v. Garver, 66 O. S. 555 at p. 564, 64 N. E. 573).

(15)

Describe the methods of amending the constitution of the United States.

Two-thirds of both houses may propose amendments which if ratified—

1. By the legislatures of three-fourths of the states, or
2. By conventions of three-fourths thereof, shall be valid to all intents and purposes, as if a part of the constitution. Congress shall, on the application of the legislatures of two-thirds of the states, call a convention for proposing amendments, which proposals shall be valid amendments, if ratified
3. By the legislatures of three-fourths of the states or
4. By conventions in three-fourths thereof. (U. S. Constitution, Art. 5).

(16)

Can property abutting upon a street improvement be assessed to pay for the same in excess of the benefits to the property? Explain your answer.

No.

Any municipality appropriating private property for a public improvement may provide money therefor, in part by assessment upon benefited property not in excess of the special benefits conferred upon such property by the improvements. Said assessments, however, upon all the abutting, adjacent and other property in the district benefited shall in no case be levied for more than 50 per cent of the cost of such appropriation. (Ohio Constitution, Art. 18 § 11) adopted Sept. 3, 1912. See also G. C. § 3819.

It must be conceded that the very foundation of the right to levy a special assessment against property is that such property has derived a special benefit from the improvement different from the general benefit accruing to all other citizens.

The principles underlying special assessments upon private property to meet the cost of public improvements, is, that the property upon which they are imposed, is peculiarly benefited, and therefore the owners do not in fact pay anything in excess of what they receive by reason of such improvement.

The exaction from the owner of private property of the cost of public improvement in substantial excess of the special benefits accruing to him, is, to the extent of such excess a taking under the guise of taxation of private property for public use without compensation.

The value of the entire benefits conferred upon the property may be assessed upon the land for the cost of the improvement; more, however, can not be exacted without impairing the inviolability of private property guaranteed by the constitution. (Tetlow et al. v. Springfield, 19 N. P. (N. S.) at p. 69; citing, Schroder v. Overman, 61 O. S. 1, 55 N. E. 158; Walsh v. Barren, 61 O. S. 15, 55 N. E. 164, and Dayton v. Bauman, 66 O. S. 379, 393, 64 N. E. 433).

(17)

(a) The legislature passed a law fixing and regulating the hours of labor, establishing a minimum wage and providing for the comfort, health, safety and general welfare of employes. A manufacturer contended that such legislation deprived him of his property without due process of law and that the courts were not open to him to obtain a remedy by due course of law?

Had the legislature any power to enact such law?

Can the manufacturer urge any provisions of the constitution so as to impair or limit that power?

(b) A law was passed which provided that if a jury in a civil case, after deliberating twenty-four hours was unable to agree upon a verdict, then seven jurors agreeing could sign and return a verdict, or the trial court could, in its discretion, after the expiration of that time, discharge the jury and sign such verdict as seemed proper and right to him. Is the law valid? Could such power be given a trial judge?

(a) No. It is true that an attempt to grant such power was made by the following provision in the Ohio Constitution:

"Laws may be passed fixing and regulating the hours of labor, establishing a minmum wage, and providing for the comfort, health, safety, and general welfare of all employes; and no other provision of the constitution shall impair or limit this power." (Ohio Constitution, Art. 2 § 34, adopted Sept. 3, 1912.

But the Supreme Court of the United States has since declared unconstitutional a minimum wage statute enacted by Congress for the District of Columbia, on grounds that clearly indicate its opinion that the states are prohibited from passing such laws by the provision of the 14th amendment to the Constitution of the United States "nor shall any state deprive any person of life, liberty or property without due process of law." (Adkins v. Children's Hospital, 261 U. S. 525, 43 Sup. Ct. 394, 67 L. Ed. 785, 24 A. L. R. 1238, 1923).

Under this decision, it is a part of the liberty of both employer and employe, guaranteed by the 14th Amendment to the Constitution of the United States, to contract for such wages as they may mutually agree upon, and any provision of a state constitution or state statute which undertakes to deprive them of this liberty is void.

(b) No.

"The right of trial by jury shall be inviolate, except that in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than ¾ of the jury (Ohio Constitution, Art. 1, § 5, adopted Sept. 3,

1912). No such power can be given a trial judge because it would be violating the constitution.

(18)

(a) A law was passed by the legislature providing for the regulation of methods of mining, weighing, measuring and marketing coal. A coal operator contended that the legislature had no authority to pass such law, and that the same was an unreasonable interference with his business. Had the legislature such power to pass the law?

(b) A manufacturer deposited large amounts of acids and destructive agents in a stream near his plant, such acids and destructive agents destroyed the beauty and usefulness of the stream and declared the act to be a provision for the conservation of the natural resources of the state, including the streams, etc. Had the legislature such authority to enact such a law?

(a) Yes.

Laws may be passed to provide for the regulation of methods of mining, weighing, measuring and marketing coal, oil, gas and all other minerals. (Ohio Constitution, Art. 2 § 36, adopted September 3, 1912).

(b) It was announced during the examination by the examining committee that this answer should be omitted due to the fact that the question is defective and ambiguous. However the answer to the question which the examiner meant to ask is laid down in Art. 2, § 36 of the Ohio Constitution which is as follows:

"Laws may be passed to provide for the conservation of the natural resources of the state, including streams, lakes, submerged and swamp lands and the development and regulation of water power and the formation of drainage and conservation districts." (Ohio Constitution, Art. 2 § 36, adopted Sept. 3, 1912).

G. C. § 1249 providing that wherever a manufacturer discharges waste into a stream, he may be restrained by the commissioner of health, is a valid and constitutional exercise of the police power of the state. (State Board of Health v. City of Greenville, 86 O. S. 1, 98 N. E. 1019).

(19)

You are the prosecuting attorney of your county. The county auditor called upon you and stated that A called at his office and claimed that his property (real and personal) was assessed for taxation purposes at its true value in money, and that B's property was assessed at approximately 60 per cent of its true value, and that other property of different classes belonging to various owners was not assessed at 50 per cent of its value; that (A) complained and contended that certain provisions of the state and fed-

eral constitutions were violated, and that the county should not be permitted to collect taxes on the assessment which he claimed to be illegal.

The county auditor assures you that he is familiar with the statutory law, but desires to know whether or not any constitutional provisions are involved, and, if so, the substance thereof.

What do you advise?

Yes, constitutional provisions are involved.

Laws shall be passed, taxing by a UNIFORM RULE, all moneys, credits, investments in bonds, stocks, joint stock companies or otherwise, and also all real and personal property, according to its true value in money, etc. (Ohio Constitution, Art. 12 § 2, adopted Nov. 5, 1918).

Since under the Ohio Constitution, all property must be taxed by uniform rule at its money value, it is held by Judge Sater of the United States District Court for the Southern District of Ohio, in the "City Ry. Company v. Martin Beard et al," 21 Ohio Law Bulletin and Reporter 384, that equality of taxation required not only that the rate imposed shall be uniform, but also that a uniform method of fixing valuations shall be pursued, and where it clearly appears that real estate is assessed for taxation at not more than 60 per cent of its actual money value and other property is returned at a higher percentage of its actual worth, Federal Courts have jurisdiction to grant relief.

(20)

(a) Has the legislature of Ohio power to provide for the creation of municipal courts in municipal corporations and to prescribe the procedure and practice in each of said courts?

(b) Have courts power to declare a constitutional amendment a nullity on the ground that it was ill-advised and would produce disastrous results to business and trade, and also because it might be detrimental to the citizens generally?

(a) Yes.

"The judicial power of the state is vested in a supreme court, courts of appeals, courts of common pleas, courts of probate and SUCH OTHER COURTS INFERIOR TO THE COURTS OF APPEALS AS MAY FROM TIME TO TIME BE ESTABLISHED BY LAW. Ohio Constitution, Art. 4, § 1, adopted Sept. 3, 1912.

Courts inferior to the court of appeals may be established by the legislature throughout the state or in any part of it, and this is not a law of a general nature which must have a uniform operation. (State v. Ritchie, 97 O. S. 41, 119 N. E. 124).

(b) No.

"Disastrous results to business or trade, following ill-advised or illegally enacted law, cannot be made the basis of a proceeding for relief to either an individual citizen, or the public in general." (Hockett v. Liquor License Board, 16 N. P. (N. S.) 417, 25 D. 117. Aff. by court of appeals, which was Aff.; Hockett v. Liquor License Board, 91 O. S. 176, 110 N. E. 485).

"The injustice of a constitutional provision will not authorize the courts to disregard it, or indirectly to annul it by construing it away. It is quite possible that the people may, under the influence of temporary prejudice or a mistaken view of public policy, incorporate provisions in their charter of government, infringing upon the proper rights of individual citizens or upon principles which ought ever to be regarded as sacred and fundamental in republican government; the remedy for such injustice must be found in the the action of the people themselves, through an amendment of their work when better counsels prevail. Such provisions, when free from doubt, must receive the same construction as any other." (Hockett v. Licensing Board, 91 O. S. 176 at p. 194, 110 N. E. 485).

(21)

(a) Were the first ten amendments to the constitution of the United States, constituting a bill of rights, designed as limits upon the state government in reference to its own citizens?

(b) Under the general grant of legislative powers has the legislature authority to fix the terms of office and compensation of officers?

(a) The first ten amendments to the United States Constitution do not place any limitations upon the rights of the state government.

"But it is universally understood; it is a part of the history of the day, that the great revolution which established the constitution of the United States, was not affected without immense opposition. Serious fears were extensively entertained that those powers which the patriot statesman, who then watched over the interests of our country, deemed essential to union, and to the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the constitution was adopted, amendments to guard against the abuse of power were recommended. Those amendments demanded security against the apprehended encroachments of the general government not against those of local government.

"In compliance with a sentiment thus generally expressed, to quiet fears the extensively entertained amendments were proposed by the required majority in congress,

and adopted by the states. These amendments contain no expression indicating an intention to apply them to the state government." (Chief Justice Marshall in Barron v. Mayor & City Council of Baltimore 7 Pet. U. S. 243, cited in Burke v. State of Ohio, 104 O. S. 220, 135 N. E. 644).

(b) Yes. § 20, Article 2 of the Ohio Constitution is as follows:

"The general assembly, in cases not provided for in this constitution, shall fix the term of office and the compensation of all officers; but no change therein, shall affect the salary of any officer during his existing term, unless the office be abolished."

(22)

Mary Roberts was appointed administratrix of her husband's estate. The probate court ordered her to furnish bond in the sum of twenty thousand dollars. Upon submitting the bond for approval, the court refused to accept it, giving as a reason, that the statute required that administrator's bonds be signed by a bonding company and not by personal sureties. Mrs. Roberts had submitted a sufficient bond signed by responsible sureties. Did such a law interfere with any constitutional right?

Yes.

The right to acquire, possess and protect property is guaranteed to the people of this state by our bill of rights, and is declared by it to be one of the inalienable rights of man. O. Const., Art. 1, § 1. This right includes the right to make and enforce contracts. Palmer & Crawford v. Tingle, 55 O.S. 423; Cleveland v. Const. Co., 67 O.S. 219.

This statute by its provisions interferes with the right to make contracts. It not only interferes with this right, but it absolutely denies to the people of this state the right to make contracts, which shall be beneficial to them. State v. Robbins, 71 O.S. 273, 279, 280.

(23)

Hill was indicted for murder. At the time of trial, the court refused, over the protest of defendant's counsel, to permit Hill's presence in the court room, on the grounds that the defendant was a desperate character and that there was danger of mob violence.

Was the defendant deprived of any constitutional right? If so, what right?

Yes.

To be confronted by his accusing witnesses. U. S. Const. Art. 6 of Amendments.

In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; * * * to meet the witness face to face, * * *.

* * * No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel. O. Const., Art. 1, § 10.

(24)

There was enacted in Congress of the United States a bill providing that anyone found guilty of treason should be electrocuted and his estate then forfeited to the state of which he was a resident. Is this act constitutional?

No.

Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attained. U. S. Const., Art. 3, § 3 (2).

(25)

(a) Is a foreign born prospective citizen naturalized under authority of the state or the United States?

(b) Does a directed verdict in civil cases violate the constitutional right to trial by jury? If so, why? If not, why?

(a) Under authority of the United States.

"To establish a uniform rule of naturalization, * * *." U. S. Const., Art. 1, § 8, (4).

The power of congress to provide a uniform system for the naturalization of aliens is exclusive, and its exercise is entirely incompatible with the exercise of any similar authority on the part of the several states. Black's Constitutional Law, p. 257, § 105.

(b) Yes, if there is any evidence to support a case.

The motion (referring to motion to direct a verdict) involves not only an admission of the truth of the evidence, but the existence of all the facts which the evidence conduces to prove. It thus concedes to the plaintiff everything that the jury could possibly find in his favor, and leaves nothing but the question whether, as a matter of law, each fact indispensable to the right of action has been supported by some evidence. If it has, no matter how slight it may have been, the motion must be denied, because it is the right of the party to have the weight and sufficiency of his evidence passed upon by the jury—a right of which he cannot be deprived, and involving an exercise of power for which, without his consent, the court is incompetent.

On the same page, and in the same connection Judge Ranney further says: "But where he has given no evidence to establish a fact, without which the law does not permit a recovery, he has nothing to submit to the jury; and the determination of the court, that the fact constitutes

an essential element in the right of action, necessarily ends the case. Gibbs v. Village of Girard, 88 O.S. 34, 40, 41, 102 N.E. 299; citing, Ellis & Morton v. Ohio Life Ins. & Trust Co., 4. O.S. 627.

(26)

(a) What is a writ of habeas corpus?
(b) Is the privilege of the writ a constitutional right?
(c) Can it ever be suspended? If so, when and by whom?

(a) A writ directed to the person detaining another and commanding him to produce the body of the prisoner at a certain time and place, with the day and cause of his caption and detention, to do, submit to, and receive whatsoever the court or judge awarding the writ shall consider in that behalf. Bouvier's Law Dictionary, Baldwin's Revision.

The writ of habeas corpus is the remedy which the law gives for the enforcement of the civil right of personal liberty. Henderson v. James Warden, 52 O.S. 242, 259.

(b) Yes.

The "privilege" of the writ of habeas corpus is secured by our national and state constitutions to every citizen. James Collier, ex parte, 6 O.S. 55, 58; O. Const., Art. 1, § 8; Fed. Const., Art. 1, § 9, (2).

(c) Yes.

"The privilege" of the writ of habeas corpus shall not be suspended, unless, in cases of rebellion or invasion, the public safety require it. O. Const., Art. 1, § 8.

* * * The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it. U. S. Const., Art. 1, § 9, (2).

(27)

The city of East Cleveland has a charter providing for its home rule, as provided for under our state constitution. It passes an amendment to its constitution, authorizing individuals of eighteen years and over to vote at all municipal elections.

Is this amendment constitutional? Give reasons.

Yes.

The Constitution itself having by Art. 18 committed to any municipality the power to frame and adopt a charter for its government and to exercise thereunder all powers of local self-government, subject to the limitations expressed in that article, a provision in the charter of a municipality, adopted in full compliance with the article referred to, which confers upon women the right to vote for all municipal elective officers to be appointed or elected to hold any municipal office provided for in such charter, is valid. State v. French, 96 O.S. 172, 117 N.E. 73.

The above case was decided before women had the right to vote in Ohio, a right later granted by the 19th Amendment. It is submitted that the same reasoning applies in the case under discussion, for if the city could permit women to vote at a time when they did not have the right, the city could extend the privilege to whomsoever it desired.

(28)

Is it within the powers of a general assembly, as conferred by the constitution, to declare that things done and created under and by virtue of unconstitutional acts of the legislature, shall nevertheless "continue to be and remain, and be regarded and recognized as legal"?

No.

The power of the legislature to validate any void or ineffectual act is limited to such acts as it might have originally performed or authorized. It therefore cannot, under the mere form and pretense of general legislation, make valid any special legislation which it had enacted in violation of the constitution. If this could be permitted, we would be back at once to the point from which we started when this court declared that special legislation in regard to municipal corporations would not be recognized as constitutional although it were clothed in a plausible appearance of general legislation. Bartlett v. State, 73 O.S. 54, 57, 75 N.E. 939.

(29)

The Chiropractors Association present a petition to the voters, calling for the submission of a constitutional amendment. The state election authorities refuse to put it on the ballot, on the grounds that the proposed amendment, if enacted, would be unconstitutional.

Mandamus proceedings are brought to compel them to put the question on the ballot.

Should the mandamus writ be issued by the supreme court? If so, why?

Yes.

O. Const., Art. 2, § 1a ("the secretary of state shall submit," etc.) is mandatory. It has become the established law of this state that no officer or tribunal may interfere either with the enactment of laws or the amendment of the constitution while the same is in process, upon the ground that such legislation, if enacted, or constitutional amendment, if adopted, will be in conflict with the constitution, state or federal. These questions are and must necessarily be reserved for consideration and determination after the legislature or constitution-making body shall have fully performed its function and such new law or constitutional amendment shall have become effective. State v. Smith, 105 O.S. 570, 572, 138 N.E. 881.

(30)

The Low Picture Company having obtained the motion pictures of the Dempsey v. Tunney fight, bring a mandamus proceeding against the Ohio State Board of Censors, to compel them to permit the showing of the picture. Will a writ of mandamus lie? Why?

No.

The Board has the right to exercise a sound discretion in its approval or disapproval of a film.

G.C. § 871-49 provides: "Only such films as are in the judgment and discretion of the board of censors of a moral, educational or amusing and harmless character shall be passed and approved by such board. When a film has been censored by the board of censors a certificate showing the approval or rejection of such film shall be issued to the party submitting the film."

It is only where the order of the director bases his disapproval upon what he terms his "general knowledge" of the film and its title, and not upon examination, that an action of mandamus will lie to compel further proceedings. State v. Clifton, 118 O.S. 91, 94, 160 N.E. 625.

(31)

Can a party in a written contract legally agree that in case a judgment is rendered against him, that he shall not appeal the case? Give reason.

No.

The stipulation of the waiver of the right of appeal in the event of a judgment rendered, is against public policy and void. Assignment of Beckenhaupt, in re 21 N.P.(N.S.) 7, 8; citing, Myers v. Jenkins, 63 O.S. 101.

The general rule, however, in foreign jurisdictions is, that a party may, by express agreement or stipulation before trial or judgment, waive his right to appeal or bring error, either wholly or partially. Appeal & Error, 3 C.J., p. 661, § 533.

(32)

A tax payer of Cuyahoga county brings a suit to enjoin the county commissioners from performing a contract which they have entered into with an individual for paving. A perpetual injunction is granted and the ruling affirmed by the supreme court. Thereafter the general assembly of the state passed an act validating and ratifying the particular contract in question. The county commissioners are about to carry out the terms of the contract when the suit is again brought by the tax payer to enjoin the payment of any money thereon.

How should the court decide the second suit?

Judgment for the tax payer.

It is well settled that the legislature has no right or power to invade the province of the judiciary, by annulling, setting aside, modifying, or impairing a final judgment previously rendered by a court of competent jurisdiction.

This court has held that the legislature cannot make a judgment which is final by the laws existing at the time it is rendered, subject to a review by a statute subsequently enacted. State v. Hinckle, 67 O.S. 144; Cowen v. State, 101 O.S. 387, 394, 129 N.E. 719.

After final judgment that a public contract is void, a statute (as in 108 Ohio Laws) validating such contract is unconstitutional as an attempt to exercise judicial power. Cowen v. State, 101 O.S. 387, 129 N.E. 719.

(33)

Write the preamble to the Federal Constitution.

See Answer 2 under Memory Work, supra.

(34)

A and B are husband and wife but have separated. A has become a citizen of the state of Indiana, while B is a citizen of the state of Ohio. A has on deposit in a bank of Ohio $500. B in the court of common pleas of the county wherein she resides institutes suit against A for divorce and alimony and makes the bank a party defendant and obtains from the court an order restraining the bank from paying such deposit to A, who is served only by publication. The bank files an answer contending that the court is without power under the due process clause of the federal constitution to exercise any right of disposition over the money on deposit. Decide the case.

The court has power to obtain control of the money on deposit and judgment should be rendered for B.

A judgment for alimony and costs may be enforced against personal property of a non-resident, within the territorial jurisdiction of the court and under its control, notwithstanding he was served with summons by publication and no personal service was thereafter obtained upon him, and he did not enter an appearance in the action in which the decree was rendered. Pennington v. Bank, 11 N.P. (N.S.) 620, 622, 623; approving, Benner v. Benner, 63 O.S. 220; Pennoyer v. Neff, 95 U.S. 714.

(35)

A city of Ohio, by its council, adopts an ordinance prohibiting any merchant or trader from carrying on an auction sale of merchandise in any store-room or on any private property within the city, unless such merchant or trader has

been engaged in a like or similar kind of business within the city for a period of at least one year next prior to the commencement of the auction sale. A, a transient dealer, comes into the city with a stock of merchandise, rents a store-room and therein commences an auction sale of such merchandise. He is arrested under a penal section of the ordinance and is prosecuted. May he be legally convicted of a violation of such ordinance?

Give reasons for your answer.

Yes.

This ordinance falls within the police power.

Under the decisions of the United States, and of this state, it is held that the inalienable rights given to the citizens of this state in O. Const., Art. 1, and the equal protection and benefit guaranteed them in that document as well as in the federal constitution, do not render the citizens immune from the operation of the police power. The police power relates not merely to the public health and to the public physical safety, but also to public financial safety. Laws may be passed within the police power to protect the public from financial loss. Holsman v. Thomas, 112 O.S. 397, 404, 147 N.E. 750.

(36)

The Jones Co. is a corporation organized under the laws of Pennsylvania for the purpose of manufacturing and selling a certain line of goods. Its factory is located in Pennsylvania and all its officers, agents and employes are residents of that state. Smith, one of its selling agents, comes into Ohio and solicits and receives orders for goods manufactured by the Jones Co. from the Ohio retailers. One of such retailers receives a consignment of goods pursuant to an order which he had placed with Smith and is not satisfied with the goods and refuses to pay therefor. Such retailer is sued by the Jones Co. in a court of competent jurisdiction of Ohio, and the retailer defends upon the ground that the Jones Co. has not complied with the Ohio laws necessary to authorize a foreign corporation to do business in Ohio. Decide the case upon the question raised by the Ohio retailer as to the right of Jones Co. to sell such goods. Give reasons for your answer.

Judgment for Jones Co.

Jones Co. was a foreign corporation, soliciting business by travelling salesmen in this state, and, under section 188, General Code, is not required to comply with the provisions of the statute referring to the doing of business by foreign corporations in this state. (G.C. §§ 178 et seq.) Hopping v. Le Gear Medicine Co., 22 App. 118, 120.

However, be that as it may, we find from the pleadings and the evidence that plaintiff was merely selling through

travelling agents and delivering goods manufactured outside of the state and had no part of its capital or plant in this state, and we are, therefore, of the opinion that said G.C. §§ 178, 179 have no application or are inoperative as to plaintiff, because in violation of the federal constitution and laws pertaining to interstate commerce. McClarran v. Longdin-Brugger Co., 24 App. 434, 437.

(37)

May any of the states of the union legally enact a law providing for the summary destruction of measuring and weighing devices, in case they are found to be deficient in measuring and weighing any products sold by measure or weight without providing due compensation for the property so destroyed?

Give reasons for your answer.

Yes.

The provisions of G.C. § 7965-1, authorizing the condemnation and confiscation of false or fraudulent weighing or measuring devices, are within the police power of the state, and do not contravene either the state or federal constitution. Williams v. Sandles, 93 O.S. 91, 112 N.E. 206.

The power of the states to legislate on the subject of the standard of weights and measures is not prohibited by the federal constitution, and consequently under Art. 10 of the amendments, is reserved to the states. Supra, p. 94.

(38)

(a) In what year and by whom was the first constitution of the United States adopted?

(b) How many constitutions have existed in Ohio, and when were they adopted?

(a) It was adopted on Sept. 17, 1787, by representatives from twelve states in convention assembled.

(b) Two constitutions have existed in Ohio; the first having been adopted on Nov. 29, 1802, and the second on March 10, 1851. The provisions of the present constitution, however, relating to the judicial power of the state were materially amended in 1912. See article entitled "Ohio Case Law" in Throckmorton's General Code of Ohio immediately preceding the index.

Contracts

(Numbers in parenthesis refer to answers following.)

I. ESSENTIALS IN GENERAL.

Contracts, 3 to 7.

27 O.S. 383; 56 O.S. 61; 98 O.S. 287; 7 C.C.(N.S.) 605.

II. OFFER AND ACCEPTANCE.

A. In General; Meeting of the Minds Necessary. (14, 19a, 26)

Contracts, 10, 47.

27 O.S. 1; 43 O.S. 166; 45 O.S. 426; 14 O.F.D. 609; 28 App. 427.

B. Acceptance and Communication Thereof. (19b, 23)

Contracts, 11, 12, 15, 18, 25.

25 O.S. 378; 12 C.C. 182; 16 C.C.(N.S.) 475.

C. Acceptance Varying from Offer. (15, 20)

Contracts, 17.

10 App. 150; 18 App. 488; 5 O.F.D. 598.

D. Time Within Which Offer Must be Accepted.

Contracts, 13.

26 O.S. 334, 342; 78 O.S. 54.

E. Revocation or Withdrawal of Offer. (19b, 25)

Contracts, 14.

30 O.S. 16; 21 App. 369; 8 C.C. 563; 16 C.C.(N.S.) 497.

F. Presumption of Acceptance.

Contracts, 19.

46 O.S. 244, 252; 4 C.C. 397; 16 C.C.(N.S.) 475.

III. CONSIDERATION.

A. Nature and Elements. (2, 21a)

Contracts, 29.

33 O.S. 405; 39 O.S. 137; 40 O.S. 400; 48 O.S. 562; 56 O.S. 9, 20; 116 O.S. 609.

B. Necessity in General. (31)

Contracts, 31.

G.C.§ 8160; 48 O.S. 562; 70 O.S. 390; 25 App. 456.

C. Detriment to Promisee or Benefit to Promisor.

Contracts, 30.

1 O. 486; 48 O.S. 562; 60 O.S. 108; 14 C.D. 72.

[*References are to Bates' Compact Ohio Digest.*]

D. Forbearance. (7)

Contracts, 33.

14 O.S. 348; 15 O.S. 295; ~~29 O.S. 631~~; 31 O.S. 637; ~~69 O.S. 294~~; 14 C.D. 72.

E. Mutual Promises.

Contracts, 3.

13 O.S. 84; 65 O.S. 507; 8 N.P.(N.S.) 274; 6 O.F.D. 482.

F. Natural Affection.

Contracts, 36.

~~8 O.S.~~ 239; 17 O.S. 650.

G. Past Consideration.

Contracts, 34.

G.C.§ 8130; 23 O.S. 637; 13 C.C.(N.S.) 473.

H. Adequacy and Sufficiency.

Contracts, 37.

19 O.S. 145, 150; 40 ~~O.S.~~ 400, 408; 48 ~~O.S.~~ 562.

I. Moral Obligation.

Contracts, 43.

40 O.S. 267; 12 D. Repr. 38.

IV. CAPACITY AND PARTIES.

A. Infants.

Infants, 13 to 19.

G.C.§ 9392-1; ~~31 O.S.~~ 72; ~~45 O.S. 505~~; 84 O.S. 385; 13 App. 414; 20 App. 229.

B. Insane Persons.

Insanity, 27 to 32.

54 O.S. 398; 17 C.C.(N.S.) 312; 29 App. 322.

C. Assignee.

Contracts, 138; Assignments, 1, 6, 8.

G.C.§§ 6346-7, 6346-8, 12946-2; 22 O.S. 398; 50 O.S. 444; ~~74 O.S.~~ 104; 108 O.S. 139.

D. Joint and Several Contracts. (21c)

Contracts, 93 to 95, 133.

G.C.§§ 8079 to 8084, 10418, 10733, 11258; 45 O.S. 525.

E. Third Party Beneficiaries. (36)

Contracts, 39, 140 to 143.

14 O.S. 464; ~~42 O.S.~~ 82; 58 O.S. 123; 110 O.S. 18, 30.

V. FORMAL REQUISITES; SEAL.

Contracts, 23, 24.

G.C.§§ 8627, 9587; 14 ~~O.S.~~ 292; 37 ~~O.S.~~ 279; 7 N.P.(N.S.) 217.

VI. WHEN CONTRACT MUST BE IN WRITING.

A. Consideration of Marriage. (6)

Frauds, Statute of, 1, 1-4.

G.C.§ 8621; 10 ~~O.S.~~ 501; 27 O.S. 121.

B. Promises to Answer for Debt, Default or Miscarriage of Another.

Frauds, Statute of, 1-9 to 14.

G.C.§ 8621; 32 O.S. 415; 32 O.S. 421; 36 O.S. 331; 45 O.S. 239; 23 App. 367.

C. Agreements Not to be Performed Within One Year. (6, 28)

Frauds, Statute of, 16 to 21.

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D. Interest in and Contracts Concerning Land. (38)

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E. Contracts Over $2,500.00. (12)

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G.C.§ 8384; 92 O.S. 44.

F. Sufficiency of Writing.

Frauds, Statute of, 38.

22 O.S. 62; 24 O.S. 283; 7 App. 164; 16 C.C.(N.S.) 592.

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A. Conditions Precedent, Concurrent and Subsequent.

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B. Express Conditions, Conditions Implied. (10, 11, 28)

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C. Failure of Consideration.

Contracts, 40, 41, 44.

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D. Impossibility of Performance.

Contracts, 189, 198, 202.

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F. Time; Time as of Essence of Contract.

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12 O.S. 344; 17 O.S. 471; 28 O.S. 116; 92 O.S. 44.

G. Remedies on Breach. (1, 13, 28, 32, 33, 37)

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H. Anticipatory Breach.

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Champerty and Maintenance, 1 et seq.

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G. Violation of Statute. (3, 9, 16, 30)

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9 O.S. 369, 379; 14 O.S. 331; 29 O.S. 557; 2 O.F.D. 255.

H. Effect of Illegality. (9, 29, 30, 39)

Contracts, 74 to 77.

G.C.§ 6393; 26 O.S. 75; 33 O.S. 321; 63 O.S. 363.

IX. CONSTRUCTION AND OPERATION. (18a, 21)

Contracts, 80 to 128.

28 O.S. 307; 44 O.S. 287; 65 O.S. 86; 65 O.S. 321; 67 O.S. 197; 83 O.S. 309; 98 O.S. 320; 28 O.C.A. 462.

X. MODIFICATION AND MERGER. (31)

Contracts, 164 to 172.

32 O.S. 415; 42 O.S. 82; 65 O.S. 495; 12 O.F.D. 635.

XI. DISCHARGE OF CONTRACT.

A. Accord and Satisfaction. (27)

Compromise and Settlement, 2, 6 to 8.

8 O. 393; 6 O.S. 71; 83 O.S. 169; 100 O.S. 348; 28 App. 162.

B. Novation. (24)

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C. By Operation of Law.

Contracts, 190-2.

107 O.S. 51; 17 App. 429.

XII. PUBLIC CONTRACTS. (22a)

Contracts, 252 to 360.

42 O.S. 263; 67 O.S. 197; 7 C.C.(N.S.) 493; 10 N.P.(N.S.) 303.

XIII. SALES.

See Personal Property, XIII.

Definitions

CONTRACT.—An agreement upon sufficient consideration to do or not to do a particular thing. Bouvier's Law Dictionary, Baldwin's Revision.

CONSIDERATION.—An act or forbearance, or the promise thereof, which is offered by one party to an agreement, and accepted by the other as an inducement to that other's act or promise. Bouvier's Law Dictionary, Baldwin's Revision.

CONDITION PRECEDENT.—Precedent conditions are those which are to be performed before the obligation commences. Bouvier's Law Dictionary, Baldwin's Revision.

GAMING CONTRACTS.—All promises, agreements, notes, bills, bonds or other contracts, mortgages or other securities, when the whole or part of the consideration thereof is for money or other valuable thing won or lost, laid, staked, or betted at or upon a game of any kind, or upon a horse race or cock fight, sport or pastime, or on a wager, for the repayment of money lent or advanced at the time of a game, play, bet or wager, for the purpose of being laid, betted, staked or wagered, are void and of no effect. Throckmorton's General Code of Ohio, § 5965.

CHAMPERTY AND MAINTENANCE.—Maintenance is defined to be an officious intermeddling in a suit that no way belongs to one, by assisting either party, to the disturbing of the community by stirring up suits; champerty a species of maintenance, being a bargain with a party to divide the land or other matter sued for between them, if they prevail in the suit which the champertor undertakes to carry on at his own expense. Reece v. Kyle, 49 O.S. 481.

ACCORD.—An agreement between two parties to give and accept something in satisfaction of a right of action which one has against the other, which when performed is a bar to all actions upon this account; generally used in the phrase "accord and satisfaction." Bouvier's Law Dictionary, Baldwin's Revision.

NOVATION.—It is a mode of extinguishing one obligation by another—the substitution, not of new paper or note, but of a new obligation in lieu of an old one—the effect of which is to pay, dissolve, or otherwise discharge it. Bouvier's Law Dictionary, Baldwin's Revision.

OHIO STATE BAR EXAMINATIONS

QUESTIONS WITH ANSWERS

[*Arranged Chronologically.*]

(1)

A enters into a written contract with B to buy B's farm, and B agrees to make A a general warranty deed within thirty days. The wife of B refuses to sign the deed. What right of action, if any, has A?

The plaintiff, A, can have an action for damages only for breach of the contract and cannot have specific performance.

"Where the plaintiff enters into a written contract for the purchase of real estate with the owners thereof, and knows that such owners are married, but the wives of such owners do not sign the contract although it was contemplated by the parties that the title should be conveyed free from the dower rights of the wives, and where the wives, without fraud or collusion with their husbands, refuse to execute deeds conveying such real estate, a decree of specific performance will not be granted against the owners, with a provision for an abatement from the purchase price of the value of the inchoate right of dower of the wives, but the plaintiff will be remitted to his claim for damages for breach of the contract." (Caple v. Crane, 10 App. 461).

"Where, in an action brought in a court of equity to enforce the specific performance of a contract for the sale of land by the purchaser against a married man, the owner of the fee, who alone signed the contract, it appears by the contract itself that someone other than the husband was expected to sign it but has not done so, and the contract contains a stipulation to convey by a good warranty deed, but contains no agreement for a covenant against incumbrances, and it appears further that the wife has not agreed to sign such contract or in any way release her inchoate right of dower in the land, and that the purchaser at the time knew that the vendor had a wife who would under the law be entitled to a right of dower, and there is no collusion between the husband and wife relating to the contract or deed, the court will not decree specific performance against the husband with an abatement in the contract price of the land of the estimated value of the prospective dower of the wife. People's Savings Bank Co. v. Parisette et al., 68 O.S. 450, 67 N.E. 896.

(2)

A (the daughter-in-law) resides with her family in the home of her father-in-law B. The father-in-law was very grateful for the kindness shown on the part of A and there were some expressions of an intention to remember A in his will, but he failed to do so. Can A recover pay for her services? Explain fully.

No.

"A daughter-in-law cannot recover compensation for services rendered to her father-in-law, while residing in his home with her family, in the absence of an express contract established by clear and convincing evidence. In such case expressions of gratitude by the father-in-law towards his daughter-in-law for her care and kindness, and some expressions of an intention to remember her in his will, are not sufficient proof of an express contract to pay for the services." Heidotting Exr. v. Heidotting, 9 App. 13, 31 O.C.A. 382.

"In general, where one man does work for another, the law implies a promise to pay, and creates a legal liability for the value of the work, but that presumption does not attach, of course, to a child, who continues with his parents after attaining adult years, or to a son-in-law, who marries into and lives with the family of his father-in-law, as one of them. In such cases evidence is required of an express agreement to pay wages, or that which is equivalent." (Lovet v. Price, W. 89).

(3)

Can the wife of a member of a board of education be legally employed by such board to teach school and draw public funds as compensation? Give reasons for answer.

Yes.

"Whoever, being a local director or member of a board of education, votes for or participates in the making of a contract with a person as a teacher or instructor in a public school to whom he or she is related as father or brother, mother or sister, or acts in a matter in which he or she is pecuniarily interested, shall be fined not less than twenty-five dollars nor more than five hundred dollars or imprisoned not more than six months, or both." G.C. § 12932.

Where a statute (as above) defining an offense designates one class of persons as subject to its penalties, all other persons are deemed to be exempted therefrom. (Sutherland on Statutory Construction, § 493).

The legislature having prohibited a member of the board of education from participating in the making of a contract with a person as teacher in a public school to whom he or she is related as father or brother, mother or sister,

by express provisions of Sec. 12932, G. C., the courts are not authorized to extend such prohibitory provisions so as to include the relation of husband and wife or other relations not therein specified. (Board of Education of Zaleski School District et al v. Boal, 104 O. S. 482, 135 N. E. 540).

(4)

A and B are by contract joint owners of a partition fence. B repairs his part of the fence but A fails to repair his part. B's cattle break through A's part of the fence and destroy A's corn. Two head of cattle die from eating the corn. What are the rights of each?

A cannot recover from B for the loss of the corn, even though there was a technical trespass and B cannot recover for the loss of the cattle.

"A part owner of a partition fence, who fails to keep in repair the part assigned to him, whereby stock from the adjacent inclosure breaks and enters upon his lands, is without remedy.

If the stock doing damage in such case, be breachy or unruly, the party damaged, in order to recover therefor, must show that the defect in his part of the fence was not the proximate cause of the damage." (Morrison W. Phelps v. Joel Cousins, 29 O. S. 135).

"The plaintiff A, having undertaken to keep this part of the fence in repair, and having failed to do so, must be regarded as contributing to his own injury, unless it be shown as a matter of fact that the alleged trespass would have been committed if the fence had been such as a good husbandman ought to keep, and whether such fact existed, should have been left for the jury to determine." 29 O. S. 135, supra.

"Under G. C. 5908, each land owner is equally obligated to keep in repair a partition fence concerning which no apportionment has been made in writing or by the township trustees; and a land owner knowing of the defective condition of the fence, who omits to repair same, is guilty of contributory negligence which bars any recovery for damages to stock which pass over it." (King v. Nicholson, 31 D. 120).

"The owners of adjoining lands shall build, keep up and maintain in good repair in equal shares all partition fences between them, unless otherwise agreed upon by them in writing and witnessed by two persons. This chapter shall not apply to the enclosure of lots in municipal corporations, or of lands laid out into lots outside of municipal corporations, or affect any provision of law relating to fences required to be constructed by persons or corporations owning, controlling or managing a railroad." (G. C. § 5908).

(5)

A bought five shares of non-par stock and ten shares of preferred stock at $100 per share from the A. B. Company.

He also bought ten shares of stock at $100 per share in the Farmers State Bank. Both companies are heavily in debt because of bad management. What is A's liability on the stock he owns in each company? Explain.

A would not be liable upon the five shares of non-par stock in the A. B. Company, by virtue of G.C.§ 8623-28 and O. Const. Art 13, § 3.

As to the ten shares of preferred stock, A would be liable to the extent of his unpaid stock, by virtue of the Ohio Constitution, Art. XIII, § 3.

As to the ten shares of stock in the Farmer's State Bank, A would be liable to the extent of the amount of his stock therein, at the par value thereof, in addition to the amount invested in such shares.. (Article XIII, § 3).

"Dues from private corporations shall be secured by such means as may be prescribed by law, but in no case shall any stockholder be individually liable otherwise than for the unpaid stock owned by him or her; except that stockholders of corporations authorized to receive money on deposit shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such corporations, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares." (Ohio Constitution, Art. XIII, § 3, adopted Sept. 3, 1912).

"The provisions of the Ohio Constitution, adopted in 1912, providing for a double liability of the stockholders in banking companies, are self-executing and do not require any legislation to make them effective." (State ex rel v. Bank, 17 N. P., (N. S.,) 236, 25 D. 246).

(6)

Mary Smith and John Jones make an oral agreement to marry. On the appointed day Jones refuses to marry and Mary Smith brings suit for breach of marriage contract. At the close of the plaintiff's case Jones' attorney moves for a judgment, claiming the plaintiff had not proven that any written communication, letter or other writing containing a promise passed between the parties. The trial court granted the motion on this ground. Was the ruling correct? State reasons. Be brief.

No.

Such contract does not come within the statute of frauds, and need not be in writing.

A contract between two persons, whereby they agree to marry each other, is not a contract in consideration of marriage within G. C. § 8621. (Hellenthal v. Bleuhm, 13 D. 513).

The Statute of Frauds, G. C. § 8621, as to contracts not to be performed within a year has no application to an agreement to marry; such agreement, until a breach terminating it is shown is regarded as a continuing contract by consent of the parties. Therefore, an agreement to marry, made in the fall of 1898, the parties keeping company constantly and frequently repeating the promise to marry until March 17, 1902, when the defendant refuses to marry plaintiff, is continuing, and not within the statute. (Jennie Barbara Hellenthal v. G. Frederick Bleuhm, Supra.)

(7)

Jennie White and James White are husband and wife. James White accuses Jennie White of having repeatedly committed adultery with George Black, a married man. James White is about to sue for divorce on this and other grounds, but before the filing of the petition, Jennie White and George Black enter into a written contract with James White, whereby Jennie White and George Black each pay $500 to James White as consideration for his agreement not to charge adultery in his divorce petition. James White omits the adultery charge and obtains a divorce on other grounds. Later Jennie White and George Black sue James White for $1000 claiming there was no valid consideration for the contract. Who should prevail? State reasons. Be brief.

James White will prevail. It is sufficient consideration to forbear from doing some act which a person legally has a right to do. James White had a right to charge adultery, and his forbearance constituted a valuable consideration. Clark on Contracts, p. 133.

G. C. § 11979-3 provides that adultery shall be ground for a divorce. Hence James White gave up a valid legal right and it was sufficient consideration to support a contract.

(8)

A traction company employs B to negotiate a franchise with the city of Cleveland by personally persuading and influencing members of the city council to approve the grant. Can B recover for such services? State reasons. Be brief.

Yes.

B can recover. An attorney appearing before a legislative body and making known that he is an attorney acting for a corporation, and using arguments that appeal to the reasoning powers of that body, and not using any underhand methods can recover for the services performed.

In a suit for recovery for services in procuring a street railway franchise, it is error to charge the jury that if the service, or any part thereof, consisted in personally persuading and influencing council to grant the franchise, there can be no recovery by the plaintiff.

This charge would make any action on the part of the plaintiff illegal on the ground that it constituted what is known as "lobbying," except a mere request for the franchises which were to be granted. If he stepped beyond this and used argument to persuade, his action became illegal. This would clearly be erroneous. Wm. Dickson v. Charles Kilgour and The Cincinnati Railway Company, 1 N. P. 17, 14 D. 59.

(9)

The Blank Motor Company and Jones enter into an agreement whereby the Blank Motor Company is to sell to Jones an automobile on the following terms—$500 upon the Blank Motor Company offering the car as a prize in a lottery and advertising same and one-half of the proceeds derived by Jones from the sale of lottery tickets.

The car is placed in the show window of the Blank Motor Company and the company advertises the lottery, whereupon Jones pays the $500 and proceeds to sell lottery tickets at $1 each, turning the names of purchasers over to The Blank Motor Company.

Jones sells 10,000 tickets, whereupon he is called before the prosecuting attorney who seizes the $10,000 to hold for the ticket purchasers. The Blank Motor Company then returns the automobile to its regular stock and sells it. Who should prevail? State reasons. Be brief.

The Blank Motor Company will prevail. G. C. § 13067 makes it a crime to advertise lotteries and G. C. § 13064 makes it a crime to promote schemes of chance. The Ohio Constitution provides furthermore that lotteries and the sale of lottery tickets for any purpose whatever, shall forever, be prohibited in this state. Art. XV, Sec. 6. Hence the contract was illegal and void. It is a well established rule in such illegal contracts, that the law will leave the parties where it finds them.

"A contract for the sale of lands which are to constitute prizes in a lottery scheme or "gift enterprise," to be set on foot by the vendee, and which are to be paid for in part by tickets in such lottery, is against public policy, and the provisions of a penal statute, and, therefore, wholly illegal.

The law will not aid a party to such contract, either in its enforcement, whilst executory, or in its rescission when executed.

When such contract has been partially performed by both parties, so that the evil purpose of the contract has

been in part effected by the co-operation of both parties, as where the vendor has withdrawn the land from market, and for the purposes of the lottery, and the vendee has paid part of the purchase money, and has, with the aid of the vendor, set the enterprise on foot, and issued and sold a number of lottery tickets, then, as to such part performance, the condition of the parties is the same as though the contract had been fully executed. The parties are in pari delicto, and the law will aid neither of them in enforcing further performance, or in undoing what had been unlawfully done. Hence, under such circumstances, the vendee cannot maintain an action to recover from the vendor, the money paid on the contract." John J. Hooker et al v. James De Palos et al., 28 O. S. 251.

(10)

The Ohio Insurance Company insures Smith's automobile against fire and issues a policy to Smith. Under the terms of the policy, Smith is to present in writing to an agent of the Ohio Insurance Company a proof of any loss within sixty days after such loss is discovered by Smith. The automobile is destroyed by fire and the next day Smith goes to the agent of the Ohio Insurance Company and asks for an adjustment, whereupon the agent and Smith disagree over the value of the automobile when destroyed. The agent finally says "We will pay you nothing. You set fire to the car to collect the insurance." Smith assaults the agent and is arrested and confined 90 days in jail. Upon Smith's release he offers proof of loss which is refused. He sues the Ohio Insurance Company, who set up as a defense that no proof of loss was filed within 60 days. Who should prevail? State reasons. Be brief.

Smith should prevail. Notice to the agent in this case, is also notice to the company, and the company is estopped from denying such notice.

"A sub-agent of a life insurance company, appointed to represent it in a particular branch of its business, becomes, in reference thereto, the direct representative of the company, and notice of a fact to him will operate as notice to the company, and it will be bound by acts done by him in respect to that branch of its business intrusted to him. (Insurance Co. v. Eshelman, 30 O. S. 647; see also Insurance Co. v. Williams, 39 O. S. 584.)

(11)

The Brown Jewelry Manufacturing Company enter into a contract with John Jones, a jeweler of 20 years experience, as follows: "Cleveland, Ohio, December 1, 1923. We offer you 2,000 14-karat gold watch chains at $2 each, as per sample attached. (Signed) The Brown Jewelry Manufacturing Co., John Brown, President."

"Accepted:—John Jones.

"December 2, 1923. I like the sample and you may ship at once. (signed) John Jones."

The sample attached was gold-plated and not 14 karat gold. The watch chains were shipped, all of them being exactly like the sample. Upon arrival Jones refused the shipment claiming the goods should have been 14 karat gold. The Brown Co. sues Jones. Who should prevail? State reasons. Be brief.

Jones should prevail.

When there is a contract to sell, or a sale of goods by description, there is an implied warranty that the goods shall correspond with the description and if the contract or sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not correspond with the description. (G. C. § 8394).

(12)

A met B on the street in Columbus, Ohio, and said: "I will give you $26 per ton for 100 tons of the pig iron you have in the yard at your Cleveland Foundry, take it at once and pay on delivery." B replied: "You have bought something." The next day A sent his agent to Cleveland, Ohio, to load the iron and B refused to deliver it. A then tendered to B $2,600 in cash and demanded the iron. B still refused to deliver it. The next day B sold the 100 tons of iron to L for $32 per ton. What, if any, relief can A obtain? Explain your answer.

None.

A contract to sell or a sale of any goods or choses in action of the value of twenty-five hundred dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold, or sold, and actually receive them, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf.

The provisions of this section apply to every such contract or sale, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract or sale be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering them fit for delivery; but if the goods are to be manufactured by the seller especially for the buyer and are not suitable for sale to others in the ordinary course of the seller's business, the provisions of this section shall not apply. (G. C. § 8384).

In these facts it is not shown that the goods are not suitable for sale to others in the ordinary course of the seller's business or that they were made especially for the buyer and hence A can obtain no relief.

(13)

A contracted to deliver to B within 40 days a boiler and engine for which B agreed to pay A $1,500 in one year from date of delivery to be evidenced by a promissory note. At the time fixed for delivery, B was insolvent. A learned of this and did not deliver the boiler and engine to B, but sold them to C for $1,500. The boiler and engine were in fact worth $2,000. B brought suit against A for $500 damages. Can he recover? Explain your answer.

No.

Where goods are sold on credit, it is an implied condition of the contract, that the buyer shall keep his credit good, and the seller is not bound to deliver the goods if the buyer be insolvent. The fact that the buyer has given his note or bill for the price payable at the expiration of the credit, does not vary the rule. (Diem v. Koblitz, 49 O. S. 41, 29 N. E. 1124).

If the insolvency of the buyer is discovered by the seller, while he yet has the goods, or while they are in transit, and he retakes them, he may elect to treat the agreement for credit as at an end, and resell the goods, unless the buyer pay or tender the price agreed on, or before the date set for delivery for the seller.

A party to a contract of sale cannot sue for its breach, unless he is himself able to perform on his part; it is, therefore, a good defense to an action by the vendee for damages for the failure to deliver the property sold, that at the time fixed by the agreement for the delivery, he was insolvent, and on that account unable to perform his part of the contract. (49 O. S. 41, 29 N. E. 1124, supra.)

G. C. § 8434 provides that subject to the provision of this chapter (referring to the Sales Act), the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price, in the following cases, namely:

Subdivision (c) When the buyer becomes insolvent. (G.C.§ 8434-C).

Both at the common law and by G. C. § 8434, insolvency alone is not a breach of the contract, therefore a seller who has sold on credit, while entitled to demand cash, is not entitled to treat the contract as at an end unless the insolvent buyer is unable to tender the cash on the day of delivery. (1 Williston on Sales (2nd Ed.) § 507).

(14)

A was a merchant in Dayton. He advertised in one of the Dayton papers as follows: "St. Clair Bank—notes of the above bank taken at par for goods at A's store." On the day the advertisement appeared M read it and went at once to A's store and selected goods A showed him to the amount of $55. Nothing was said by either party how or in what funds the goods were to be paid for. A sent the goods by a clerk to M's place of business with instructions not to take St. Clair notes. The clerk left the goods at M's store without communicating the instructions. A sent him back at once to tell M that he, A, would not take St. Clair notes for the goods,must have the money, or a return of the goods, which A's clerk told to M's clerk, M being absent then as well as when the goods were delivered. In the afternoon, M tendered A St. Clair notes of the face value of $55 the price of the goods. The notes were worth 40 per cent on their numercial value. The tender was kept up. A sued M for the price of the goods and the notes tendered were brought into court by M. Can A recover? Explain your answer.

Yes.

In Arnold v. Phillips, 1 D. Repr. 195, it was held that the advertisement constituted an offer which was accepted by M. This is an erroneous decision. Advertisements and quotations are not construed to be offers, but inducements to make an offer, unless very definite in terms. In the above case not a single term of the so-called contract was definite except the medium of payment. For numerous decisions contrary to the above case see I Williston on Contracts, §§ 27, 31 and 32.

(15)

H was a salt dealer in Cincinnati. He wrote S in Memphis that he would deliver him 5,000 barrels of salt at Memphis within a reasonable time at $2 per barrel, 30 days net. S answered at once that the price was satisfactory and he would take the salt, but that for certain business reasons he did not want the salt shipped to him but wanted it shipped to K at Memphis. S stated in the letter that he S was the buyer and would be responsible for the purchase price. H neglected to deliver the salt. In the meantime the price went up. S demanded delivery and H refused, claiming there had been no valid acceptance of his offer. S brought suit. Can he recover? Explain your answer.

Yes.

"A contract for a quantity of salt to be shipped to the plaintiffs at Memphis was not varied or qualified in its acceptance by the request that the salt be shipped to K at Memphis instead of the plaintiffs, where no change was

made as to the parties to the contract or their liability, and business reasons for the request were given." (A. E. Smith & Co. v. H. B. Shanks and H. S. Phillips, Partners as Shanks, Phillips & Co., 9 N. P. (N. S.) 508, 21 D. 817).

In the opinion at page 509, it is said "the request as made did not inject any new term, nor was it a counter-offer. It was in effect the asking of a business favor, a request on an immaterial matter, and did not vary the offer. (Page on Contracts, p. 79).

Of course, where an attempted acceptance varies the terms of the offer as to some material matter, or where the acceptance is qualified there can be no contract, for it is elementary that the offer must be accepted in the precise terms as made.

(16)

A contract in writing for the sale of real estate was made, executed and delivered on Sunday. Does the fact that it was made on Sunday render it invalid in Ohio?

No.

Making a single bargain on Sunday is not common labor, and is not prohibited in Ohio. It was queried but not decided whether this ruling covers pursuing an avocation, as that of merchant, which consists in selling or bargaining in the course of business. Accordingly, a contract for the sale of land made on Sunday may be specifically enforced. (Bloom v. Richards, 2 O. S. 387, overruling Sellers v. Dugan, 18 O. 189).

The distinctive principle established by the case of Bloom v. Richards, is, that Sunday laws are mere civil regulations for the good of society, and not designed to enforce or require any religious observance of the day; and, that being penal in their nature, such laws will not be extended by construction beyond their plain import; so that, whatever act may be lawfully done on any other day of the week, is equally lawful on Sunday, unless its performance on that day is forbidden by statute. Our statute goes no further than to the prohibition, on that day, of common labor, the arrest of persons on civil process, the selling of intoxicating liquors and certain shows, (now including moving picture shows, Richards v. State, 110 O. S. 311) games and sports. It was held in that case that the making of a contract for the sale of land did not come within the prohibition against common labor on Sunday, and the specific performance of such a contract made on that day was enforced. The case was thoroughly considered, and it is shown by Judge Thurman, in an opinion of great research, that the principles stated are maintained by the great weight of authority in this country. (State of Ohio v. Thomas, 61 O. S. 444, at p. 465, 56 N. E. 276).

(17)

Can a contract for furnishing articles for sale at retail, which stipulates that the buyer shall not re-sell below a certain price be enforced in Ohio?

No.

"One who sells articles manufactured solely by him is subject to the statutory and common law inhibitions against restraint of trade, and will not be protected in an effort to fix prices and control sales and sub-sales to wholesalers and retailers because of the alleged necessity of such control in order to protect him in the retail business which he has retained; and contracts which are confessedly part of a "system" of contracts, entered into by such a manufacturer with vendees whereby the said vendees are required to protect the fixed retail price, and to sell at retail only, and not to sell to other retail dealers who have not entered into a like contract, are not enforceable, and an action for liquidated damages on account of the breach of such a contract will not lie." (W. D. Freeman v. Raphael W. Miller, 9 N. P. (N. S.) 26, 21 D. 766).

"The public interests necessarily become injuriously affected because the price is fixed, and competition, which the law ever encourages is stifled." (Salt Co. v. Guthrie. 35 O. S. 666. State v. Standard Oil Co., 49 O. S. 137, 30 N. E. 279). "The public being therefore directly and injuriously affected by the arrangement, any question of reasonableness of restraint yields to that of public interest. Public welfare is first to be considered, says Fuller, Chief Justice, in "Fowle v. Parke," 131 U. S. It is shown that a restraint which affects public interests is always unlawful however much it may be for the benefit and protection of the parties or reasonable from their standpoint." (Idem at p. 31).

(18)

(a) Does a valid statute in force when a contract is made, and applicable to its subject-matter, become a part of the contract as though written therein?

(b) The son of W was employed by X company. X company claimed the son had received and converted to his own use large sums of money belonging to X company. The X company threatened to have the son arrested and prosecuted for embezzlement unless the father would sign the following agreement:

"In consideration of the sum of $1 to me in hand, paid by the X company, I hereby guarantee the payments to the X Company of all such amounts of money as the books of said Company may, on examination and audit, show to be due it from my son J. W. Such audit to be made without delay, and my said son to be allowed opportunity to see the books of said company at the company's office. I to

have sixty days in which to pay the amount so found due after the said audit is completed. The said sixty days time to be taken as a further consideration for the making of this guarantee by me."

W signed the agreement. The audit revealed $10,632 shortage. Can X company recover from W on the contract? Why?

(a) Yes.

Statutes in force at the time a municipal contract is made, enter into, and become a part of it. (Cincinnati v. Public Utilities Commission, 98 O. S. 320, 121 N. E. 688).

A subscription to the capital stock of a corporation is made with reference to the statute then in force and the provisions thereof, as to time and manner of payment become a part of the contract. Ordinarily a cause of action for installments of such stock subscriptions payable upon call by the board of directors, does not accrue until the time fixed by the board of directors for payment thereof. (Thomas v. Kalbfus, 97 O. S. 232, 119 N. E. 512. Citing R. R. v. Hall, 26 O. S. 310 and Kilbreath v. Gaylord, 34 O. S. 305).

A valid statute is a part of subsequent contracts as much as if it were set out therein in full. (Robbins v. Hennessey, 86 O. S. 181, 99 N. E. 319. Weil v. State, 46 O. S. 450, 21 N. E. 643).

While a valid statute regulating contract is, by its own force, read into and made a part of such contracts, it is otherwise as to invalid statutes. (Palmer v. Tingle, 55 O. S. 423, 45 N. E. 313; Aff. 9 C. C. 708, 6 C. D. 709).

(b) No.

The most obvious example of agreements tending to obstruct public justice are agreements to stifle criminal prosecutions.

"You shall not make a trade of a felony. If you are aware that a crime has been committed, you shall not convert that crime into a course of benefit or profit to yourself. (Clark on Contracts, p. 366, 3rd Ed.)

"A contract in order to be valid and binding, must be the result of free assent of the parties making it, and where a father is coerced into signing an instrument, guaranteeing the payment of the amount of a defalcation by his son, by threats, of the arrest and prosecution of his son, for embezzlement if such guaranty is not given, the guaranty may be avoided on ground of DURESS. (Maxwell-Rolf Stone Company v. John P. Whigham, 23 C. C. (N. S.) 529, 34 C. D. 360).

(19)

(a) B sent a proposition to sell goods in writing, that, by mistake, was ambiguous, and M the receiver of the writing, knowing of such ambiguity, claimed an improba-

ble meaning, unreasonably favorable to himself and not intended or thought of by the sender, and M without notice to B or inquiry of him as to his intended meaning, ordered the goods, obtained and used them. Was B bound by the proposition? Was M liable for the price mistakenly stated in the proposition or for the reasonable market value of the goods?

(b) A makes an offer to sell stock to B. The offer is not revoked. A sells to another. B accepts the offer without knowledge of sale to another. Did the sale by A prevent the acceptance from closing the contract? What rights, if any, has B?

(a) No.

All text writers agree that there must be a meeting of the minds in order to have an enforceable contract. (See Clark on Contracts, § 10).

Where one party has made an offer that is obviously capable of two different meanings, that he intended to convey one meaning, but that the other party understood it to have the other meaning and accepted it accordingly, the partis have failed to contract. If now, one of them performs the contract, as he understood it, he cannot enforce his understanding against the other party; indeed, he has no contract right at all for there is no contract, yet the other party has benefited; he expected to pay for the benefit and payment for it was expected; may he keep the benefit without paying for it? The Law's answer to this question is an emphatic negative. Hence M is liable on the quasi-contractural obligation of QUANTUM VALEBANT. (Modern American Law, Vol. 7, p. 69, § 61).

Where a proposition to sell goods is sent by writing that, by mistake, is ambiguous; and, knowing of such ambiguity, the receiver of the writing claiming an improbable meaning, unreasonably favorable to himself, and not intended or thought of by the sender, and without notice to the sender or inquiry of him as to its intended meaning, orders the goods, obtains and uses them, such receiver of the goods is liable to the seller of the same for the value of the goods used, as if no proposition had been sent." Butler v. Moses, 43 O.S. 166, 1 N.E. 316.

(b) B has a right of action for damages for failure to deliver the stock.

"If a person offers by letter to sell stock to another but sells it to a third person without revoking the offer, an acceptance by the offeree, before he hears of the sale, is a contract, and his letter on hearing of the sale, stating that the seller ought to try and get him a like amount, is not an assent to a rescission. The buyer is not obliged to tender performance, the seller having disabled himself to perform. (Livingston v. Klopper, 9 D. Repr. 185, 11 Bull. 175).

The court says at p. 186: the defendant could safely sell to another only by revoking his proposal to the plaintiff or by waiting a reasonable time without an answer. He did neither, but acted in utter forgetfulness or disregard of that proposal. It was too late to revoke it after it had been accepted. (Pollock on Contracts (Wald's Ed.) p. 8; Anson on Contracts 17-23).

While the defendant's sale to another was a revocation so far as his own intention was concerned, it could not affect plaintiff, unless communicated to him before his acceptance. (Leake's Digest of Law of Contracts p. 42).

Had the plaintiff learned of such sale in any way before his acceptance, it would have been a communicated revocation. (Dickinson v. Dodd, L. R. 2 C. H. p. 463, cited in 9 D. Repr. 185).

(20)

On December 8th, X offered to sell Y 2000 to 5000 tons of iron rails on certain terms specified, adding that if the offer was accepted X would expect to be notified prior to December 20th. And on December 16th Y directed X to enter an order for 1200 tons "as per your favor of the 8th," which order on December 18th X declined to fulfill. On December 19th Y accepted the original offer. Did such acceptance create a binding contract? To what extent was X bound?

No. Y has no redress.

"When an offer has been rejected, it ceases to exist and cannot thereafter be accepted, even though the acceptance is made within a time which would have been sufficiently early, had there been no rejection.

The principle is most commonly illustrated where a counter offer or conditional acceptance which amount to a counter offer is made by the offeree. This operates as a rejection of the original offer. (Williston on Contracts, Vol. 1, § 51).

"Acceptance of a written offer to sell must be unconditional, a conditional acceptance of the offer or proposing a different contract is a rejection, and it is then too late to accept the offer." Steel v. Murphy, 29 O. C. A. 337, 10 App. 150.

(21)

(a) What is a sufficient consideration to support a contract.

(b) Is it necessary that the parties to a written contract be definitely identified or described?

(c) Will a promise by an indefinite and unidentified number of persons to do a particular thing jointly, be enforceable?

(a) A VALUABLE CONSIDERATION IS THE ONLY KIND RECOGNIZED IN OHIO.

"A valuable consideration in the legal sense may consist either in some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility, given, suffered or undertaken by the other." (Anson on Contracts, p. 68).

A valuable consideration is such as money, marriage or the like, which the law esteems as an equivalent for the grant; and is therefore forwarded in motives of justice. (Judy v. Louderman, 48 O. S. 562, 29 N. E. 181).

In a bilateral contract the consideration takes the form of mutual promises, in unilateral contracts, it takes the form of a promise on one side for an act on the other.

(b) YES, the parties to an obligation must be definite, both those having the right to exercise control and those bound. It is of the essence of obligation that the liabilities imposed are imposed on definite persons, and are themselves definite. The rights which it creates, are rights in PERSONAM. (Clark on Contracts, § 4, p. 63-D).

(c) No.

A promise by an indefinite and unidentified number of persons to do a particular act jointly, cannot be enforced, as the promisee will not be permitted to proceed against selected persons to compel them to do by themselves what they have only promised to assist others in doing. (Clark v. Great Northern Ry. Co., 81 Fed. 282).

(22)

(a) Can a member of a board of education be legally held for any pecuniary interest in any contract entered into by the board? Why?

(b) To what extent may a husband or wife enter into a contract, one with the other? Or with any other person?

(c) Does ignorance of contents of a contract relieve a party of its effect?

(a) No.

A board of education is regarded as a public-quasi corporation and therefore its members are not personally bound. (State ex rel., v. Freed, Treas, et al., 10 C. C. 294, 6 C. D. 550).

G. C. § 4757 provides: "Conveyances made by a board of education shall be executed by the president and clerk thereof. NO MEMBER of the board shall have directly or indirectly, any percuniary interest in any contract of the board or be employed in any manner for compensation by the board of which he is a member, except as clerk or treasurer. No contract shall be binding upon any board unless it is made or authorized at a regular or special meeting of such board.

(b) A husband or wife may enter into any engagement or transaction with the other, or with any other persons which either might if unmarried, subject, in transactions between themselves, to the general rules which control the actions of persons occupying confidential relations with each other. (G. C. § 7999).

A husband and wife cannot by any contract with each other alter their legal relations except that they may agree to an immediate separation, and make provision for the support of either of them and their children during the separation. (G. C. § 8000).

G. C. § 7999 eliminates the restrictions that fettered the wife at common law, and gives to her the same freedom of contract which the husband may have. (Dubois v. Coen, 100 O. S. 17, 125 N. E. 121).

G. C. § 8000 is a limitation imposed on the right of contract between husband and wife in that they may not "alter their legal relations" except by the method and to the extent therein stated. (Dubois v. Coen, 100 O. S. 17, 125 N. E. 121).

(c) Generally it does not.

A party cannot set up a mistake on his part alone induced by his own negligence, where one might have learned the facts by inquiry and no fraud on the other side has precluded his making such inquiry. He cannot afterward insist that he was mistaken; thus, A and B were negotiating for the lease of a building by A to B. A drew up a written lease and presented it to B who signed without reading it. He is bound by its stipulations even though ignorant of them when signing. There is here no MUTUAL mistake, and it is almost always true that one who signs a written agreement without reading it, is bound by its terms, when there has been no FRAUD, MISREPRESENTATION or DURESS. (Bays on Contracts p. 82, 1911 Ed. Muskovitz v. Ins. Co. 3 App. 422 at p. 424, 21 C. C. (N. S.) 250).

A party to a written contract cannot avoid it on the ground that he did not know what terms were set forth therein, if he had an opportunity to read such contract, and the adverse party was not guilty of any fraud or misrepresentation. (Harvester Co. v. Daum, 19 N. P. (N. S.) 299, 28 D. 22).

(23)

A signs an order for ten machines to be constructed by the X Company, the order containing a provision that the order is subject to the approval of the X Company. The X Company immediately on receipt of the order constructs the machines and ships them to A, who refuses to accept them. The X Company failed to notify A that it had approved or accepted the order. Is A bound to accept and pay for the machines? Give brief reasons for answer.

No, for an order is the same as an offer.

An offer to purchase goods in accordance with a proposition theretofore submitted, does not constitute an enforcible contract of purchase, until the offer has been submitted to the seller and approved by him. Durant-Dort Carriage Co. v. S. I. Karth & Br., 14 C.C.(N.S.) 341, 23 C.D. 343.

(24)

(a) What is a Novation?

(b) How many parties are necessary to a Novation?

(a) Novation is a transaction whereby a debtor is discharged from liability to his original creditor by contracting a new obligation in favor of a new creditor, by order of the original creditor. Gerlaugh v. Riley, 2 N.P.(N.S.) 107, 110, 14 D. 557.

The requisites of a contract of novation are:

1. A previous valid obligation;

2. An agreement of the old parties to the new contract, that is, of the two parties to the old contract and the party to the new contract;

3. That the new contract shall be so complete as to extinguish the old contract;

4. The making of a valid new contract. Grant-Holub Co. v. Goodman, 23 App. 540, 545, citing, Jarmusch v. Otis Iron & Steel Co., 3 C.C.(N.S.) 1, 13 C.D. 122.

(Example)

A owes B $1000. B owes C $1000. The three meet and agree that A shall pay C. The claim of B against A is extinguished. B's obligation to C is extinguished. A new obligation from A to C is created.

(b) Three.

The simplest form of a novation is here given, consisting of two original debts and three parties. It is, of course, perfectly possible that there may be several debts and a corresponding increase in the number of parties. Page 2nd Ed., 1920, § 2498.

(25)

A offers to subscribe $5,000 to the capital stock of a proposed railroad, conditioned upon the construction of its road along a designated route. Before the acceptance of A's offer by the company, A dies. Can the company recover against his estate? Give reasons for answer.

No.

An offer in writing to subscribe to the capital stock of a railroad company, conditioned upon the construction of its line of road along a designated route, is revocable at the option of the party making such offer at any time before its delivery to and acceptance by such company; and his

death before such delivery and acceptance works such revocation.

Until some action is taken on the basis of a subscription to a benevolent or other enterprise, it may be revoked. The promise in such case stands as a mere offer, and may, by necessary implication, be revoked at any time before it is acted upon. It is the expending of money, etc., or incurring of legal liability, on the faith of a promise, which gives the right of action, and without which there is no right of action. Wallace v. Townsend, 43 O.S. 537, 547.

(26)

A and B have an oral agreement to the effect that B shall purchase $1,000 worth of lumber within six months at an agreed price. All the terms and conditions are agreed upon between the parties and A and B are to meet the next day at a lawyer's office and put their agreement in writing. The agreement was reduced to writing but never signed by the parties. Are the parties bound by the oral agreement? Give brief reasons for answer.

Yes.

The minds of the parties having met with reference to a proposed contract in writing, and the conditions to be embodied therein, the mere fact that the contract, which was not ready for signature at the time of reaching the agreement was never signed, does not deprive it of its binding character. Hence, such a contract, where not within the scope of the statute of frauds, is enforcible. Machine Co. v. Neth, 7 N.P. (N.S.) 217, 229, 19 D. 169, 174; Aff. 75 O.S. 603 mem.; citing, Blaney v. Hoke, 14 O.S. 292.

(27)

A and B have a bona fide dispute over the amount due A from B on an unliquidated claim. B sends A a check for $500 upon the condition that it be in full of A's claim, and specifies that the check is to be returned to him if not satisfactory. A cashes the check and makes further claim on B for the amount he still claims is due. Who prevails? Give brief reasons for answer.

B prevails.

Where there is a bona fide dispute over an unliquidated demand and the debtor tenders an amount less than the amount in dispute, upon the express condition that it shall be in full of the disputed claim, the creditor has but one alternative; he must accept the amount tendered upon the terms of the condition, unless the condition be waived, or he must reject it entirely, or if he has received the amount by check in a letter, he must return it.

Where in such case the creditor retains a check which was sent upon the condition that it shall be in full satisfac-

tion of the debt claimed to be due, and receives the money thereon and notifies the debtor that the amount is placed to his credit, but that he does not intend that the same shall close up the matter in dispute, to which the debtor makes no reply, such silence by the debtor does not amount to a withdrawal of the condition which accompanied the tender, nor to a waiver of it. The transaction is an accord and satisfaction. Grain & Hay Co. v. Conger, 83 O.S. 169, 93 N.E. 892.

(28)

Smith sues Brown to recover the value of work and labor performed by him for a period of four years, based on an oral contract whereby Smith was to work for Brown.

Can Smith abandon the work before the four years are up and recover upon quantum-meruit for service rendered?

No.

It is true that the agreement could not have been performed within a year from the making thereof, and, therefore, under the statute of frauds, it could not have been enforced by action. It might, however, have been performed by the parties, and, when performed, the parties would have been bound by it; or, if the plaintiff had performed, the defendant would have been bound to perform it on his part.

The express promise contained in the agreement, under which the plaintiff assumed to render the service, excludes the presumption of the implied promise relied on, that the defendant would pay the plaintiff the reasonable value of his services. The default of a defendant, or his refusal to go on with a contract which falls within the statute of frauds, is an essential condition of the right to recover for services rendered under it. It is only in cases where the defendant, by reason of his own breach of such contract, is estopped from setting it up as a defense that an action for the value of the work done under it can be maintained. Abbott, etc., v. Inskip, 29 O.S. 59, 61.

(29)

Black and others agree to purchase land at delinquent tax sales by pooling their money and letting only one bid, so as to prevent competition.

Is the contract for the sale of land entered into valid?

No.

A partnership or contract formed for the purchase of land at a sale for taxes, is against the policy of the law; and if such contract or partnership be entered into for the express purpose of making such purchases, it is a fraud on the owner of the property, and the purchaser cannot obtain a valuable title.

Such combinations have, necessarily, a direct tendency to prevent competition, which it is the duty of the legislature

and the policy of the law to encourage. Over a sale of this description, the owner has no control; he cannot refuse a bid, or adjourn the sale, or fix a sum below which the property shall not be struck down. The sale is managed by the agent of the state. The owner is not consulted. Dudley v. Little, 2 O. 504, 505, 506; Piatt v. Oliver, 2 O.F.D. 55, 1 O.F.D. 586.

(30)

Jones, a justice of the peace, calls upon your client to assist in making a search and arrest in an alleged liquor violation, stating that such search and arrest was lawful, and promised to indemnify your client if he sustained any damage by reason of assisting in the search and arrest.

It turns out that the search and arrest were illegal and judgment is recovered against your client for ten thousand dollars and damages.

Can your client hold Jones, the justice of the peace, on his contract of indemnity?

No.

Where a justice of the peace called upon a person to assist a constable in making an arrest upon a capias ad satisfaciendum, stating that such arrest was lawful, and promising to indemnify such person for assisting to make the arrest and prevent a rescue, and it turned out that the arrest was illegal, and a judgment had been recovered against the person assisting, for the trespass; Held, that the justice was not liable on his promise of indemnity—the contract being for the performance of an illegal act. Cumpston v. Lambert, 18 O. 81.

(31)

On Jan. 13, 1924, William Landon and Thomas Hanley entered into the following written agreement: Mr. Landon hereby agrees to deliver to Thomas Hanley 300 good stock hogs, none to weigh less than 75 pounds, to be delivered in Carey, Ohio, from the 1st to 5th of March next, for which Thomas Hanley agrees to pay $5 per 100 pounds gross weight on delivery.

(Signed) Wm. Landon,
Thomas Hanley.

Tiffin, Ohio, Jan. 13, 1924.

After the execution of the agreement, Landon told Hanley that he would want an advancement of money on the contract before delivery, and Hanley promised to make an advancement of $200. No advancement was made. On March 1st Hanley demanded delivery of the hogs and Landon refused on the ground that Hanley had not kept his promise to make an advance of money on the contract. At the time specified for delivery the price of such hogs had advanced to $6 per 100 pounds. Hanley sued Landon to

recover damages for breach of the written contract. Landon set up as defense that the written contract had been modified subsequently by verbal agreement.

Which party should prevail and why?

Hanley should prevail since the verbal promise for advancement of money was not based on any consideration.

"It appears to be well established, that a verbal agreement, to be effectual and binding as an alteration of the express terms of a prior written contract between the parties, must be supported by a new and valid consideration. And that a mere executory contract, of the kind to constitute an exception to this rule, must have been acted upon so far, that a refusal to carry it out would work a fraud on one of the parties. If the solemn stipulations of a written contract could be altered by a mere naked verbal promise under such circumstances, that certainty, which is the greatest guaranty of safety among business men, arising out of written contracts, would be greatly weakened. And evidence of loose and inconsiderate conversations, often not fully understood or accurately remembered, would be resorted to in many cases, to show waivers or variations in the stipulations of parties, with a view of avoiding the binding obligations of written contracts." Thurston & Hays v. Ludwig, 6 O.S. 1, 9, 12.

(32)

Atwood sold a horse to Brown for $300 and warranted it sound. Brown paid the $300 at the time of sale and took the horse. Subsequently Brown found the horse to be unsound. If the horse had been sound it would have been worth $200. It was in fact worth only $100. (a) What remedies has Brown? (b) Which remedy would you advise Brown to pursue?

(a) Brown may either keep the horse and recover the difference between its true value, and that which its value would have been, had there been no breach of warranty, which in this case would amount to one hundred dollars; or Brown may elect to disaffirm and rescind the contract in its entirety, returning the horse and recovering the purchase price. For a review of the law pertaining to the rights of the seller where there has been a breach of warranty, see G.C.§ 8449. The term goods as used therein would include a horse. See G.C.§ 8456, also Palmer v. Cowie, 7 C.C.(N.S.) 46, 17 C.D. 617.

(b) Brown should be advised to rescind the sale and recover his three hundred dollars, for the horse is worth but two hundred, thereby he will effect the saving of the sum of one hundred dollars.

(33)

A entered into a contract with B to lease to the latter

certain property. A failed to carry out the contract according to the terms thereof and B sued A in a court of competent jurisdiction to compel specific performance by A of his contract for the execution of the lease. Later B by his attorney came into court and dismissed the suit for specific performance without prejudice, at plaintiff's costs, and at the same time B filed a new suit against A in an action for damages suffered by B on account of A's failure to carry out the contract. Assuming that you were employed by A as his attorney in the second suit, what would be your course of action and procedure?

Give reasons for your answer.

Answer should be filed, setting up as a defense: "That the plaintiff in filing the first suit elected to pursue his remedy of specific performance for the failure of this defendant to comply with the provisions of said contract, and by such election is barred from prosecuting this action for damages." Lee v. Thoma, 17 C.C.(N.S.) 144 [aff. 91 O.S. 144] citing Zutterling v. Drake, 10 C.C.(N.S.) 167.

(34)

A newspaper made an advertising offer of $1,000 free insurance to be paid the heir of anyone killed by accident while in the pursuit of his vocation, provided a copy of the newspaper was found on his dead body. John Smith fell from an automobile dead with a copy of the paper in his pocket. What must James Smith, his heir, prove in order to collect?

James Smith must prove:

1. That he is the heir of John Smith;

2. That John Smith was killed by accident;

3. While in the pursuit of his vocation;

4. That a copy of the newspaper was found on the dead body;

5. That the deceased carried the newspaper, knowing of the offer and intending to accept the offer thereby.

"To make performance of a thing proposed sufficient as an acceptance of the proposal, performance must have been induced by the proposal and must have been in accordance therewith." 13 C.J., Contracts, p. 275, § 73.

(35)

Richard Roe and Mary Roe were husband and wife. Mary Roe was guilty of an act consistituing a substantial and valid ground for divorce in favor of Richard Roe. The latter sued Mary in a court of competent jurisdiction for the annulment of the marriage contract. Before the necessary time for the hearing of the divorce case had elapsed, Richard promised to marry Anna Smith immediately after

the rendition of the decree in divorce. In due time the court in the divorce case annulled the marriage contract and thereupon Richard refused to marry Anna. Thereupon she sued Richard to recover damages for breach of contract. Is her action maintainable? Why?

No.

An agreement to marry on divorce of a present husband or wife of either of the parties is regarded as unenforceable, being against public policy, and morals, even though made while suit for divorce is pending. L.R.A. 191, p. 69, § B.

(36)

G opens up a savings account in the Cleveland Trust Co. to the joint credit of himself and R, with the notation that such account is payable to either, and the balance at the death of either is payable to the survivor, the authority to remain in full force until receipt by the bank from the depositor of written notice of its revocation. G dies without revoking such authority, and his administrator thereupon brings suit to obtain payment to him of the balance of such savings account. Will he succeed in such suit? Why?

No, the administrator could not recover because the interest of G terminated at his death, in favor of R.

"After all, upon deposit of an account the bank is constituted a debtor, and when the depositor orders the bank to pay himself or another upon order of either party, notifies the second party of the completed transaction and secures his signature evidencing assent to the arrangement, he has created in the second party by contract a joint interest in his right to the deposit equal to his own." Cleve. Trust Co. v. Scobie, 114 O.S. 241, 253, 151 N.E. 373.

(37)

A verbally agrees with B to ship to C, who is B's customer, 500 bushels of wheat per month for 12 months. A ships to C only 200 bushels the first month and 300 bushels the second month. Upon learning of this, B notifies A that he rescinds the contract. Can A recover in a suit for damages against B for breach of contract?

No.

This contract is entire and indivisible, and was breached by A.

G.C. § 8425 provides: * * * (2) When there is a contract to sell goods to be delivered by stated installments, which are to be separately paid for, and the seller makes defective deliveries in respect to one or more installments, or the buyer neglects or refuses to take delivery of or pay for one or more installments, it depends in each case on the terms of the contract and the circumstances of the case,

whether the breach of contract is so material as to justify the injured party in refusing to proceed further and suing for damages for breach of the entire contract, or whether the breach is severable, giving rise to a claim for compensation, but not to a right to treat the whole contract as broken.

(38)

A, by oral contract, agrees to sell and convey his house and lot to B for $5,000. B pays to A the $5,000 and upon A's refusal to convey the house and lot to him, brings suit against A to compel specific performance of such agreement. Can such action be successfully maintained? State briefly reason for answer.

No.

G.C.§ 8621 provides:. No action shall be brought whereby to charge the defendant, * * * upon a contract or sale of lands, tenements, or hereditaments, or interest in, or concerning them, * * * unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged therewith, or some other person thereunto by him or her lawfully authorized.

On a verbal agreement for the conveyance of land, the payment of the purchase money, whether made in money or services, will not take the agreement out of the operation of the statute of frauds. Crabill v. Marsh, 38 O.S. 331; Newman v. Newman, 103 O.S. 230, 133 N.E. 70.

(39)

X and Y wager $100 each in a race of their respective horses. The money is placed with R as stakeholder. Before the race comes off, X changes his mind and demands his money from the stakeholder, who refuses to give it to him.

Can X recover the money by an action at law?

Yes.

An improper agreement was made to run, and the parties becoming satisfied of its impropriety, abandoned it. It seems to us such agreements ought all to be abandoned, not kept, and it would be iniquitous to allow a depositary, under such circumstances, to plunder the repenting and contracting parties. Our statute expressly authorizes the loser to sue for and recover back the loss; 29 V. 443 (G.C.§§ 5965, 5966). Will you then say there shall be no rescission of the contract, drive on the race, and give an action, when you will not allow a recovery before? The late case in England, 3 Car. & P. 371, to be sure, holds that you can recover, if the event bet upon does not happen. Barrett v. Neill, W. 472, 473.

Corporations

(Numbers in parenthesis refer to answers following.)

I. INCORPORATION AND ORGANIZATION; AMENDMENTS OF ARTICLES. (1, 12, 13, 28, 31)

Corporations, 2 to 23, 33 to 36.

Gates' Ohio Corporation Manual, §§ 4 to 11, 23, 103, 104, 129; O. Const. Art. 13, § 2; G.C.§§ 8623-3, 8623-4, 8623-14, 8623-15; 58 O.S. 577; 72 O.S. 156; 72 O.S. 455.

II. CORPORATE EXISTENCE AND CAPACITY. (2, 19, 28, 37)

Corporations, 26 to 32.

Gates' Ohio Corporation Manual, §§ 1 to 3, 107, 108; G.C.§§ 8623-7, 8623-8; 12 O.S. 73; 18 O.S. 150; 22 App. 482; 26 N.P.(N.S.) 401.

III. CORPORATE NAME, SEAL. (13c)

Corporations, 39.

Gates' Ohio Corporation Manual, §§ 9, 12, 23, 104, 105, 114; G.C.§§ 8623-4(1), 8623-5, 8623-14(j); 12 C.C.(N.S.) 134; 6 N.P. 300; 7 N.P. 135.

IV. PRINCIPAL OFFICE, DOMICILE.

Corporations, 40.

Gates' Ohio Corporation Manual, §§ 13, 102, 104; G.C.§§ 8623-2, 8623-4; 37 O.S. 450; 117 O.S. 345.

V. REGULATIONS AND BY-LAWS.

Corporations, 41 to 44.

Gates' Ohio Corporation Manual, §§ 16, 21, 56, 111, 112, 116; G.C.§§ 8623-11, 8623-12, 8623-16; 68 O.S. 442.

VI. CAPITAL, STOCK AND DIVIDENDS.

A. Nature, Amount and Reduction of Capital and Shares. (14, 34)

Corporations, 47 to 54.

Gates' Ohio Corporation Manual, §§ 8, 15, 48, 49, 104, 113 to 115, 137 to 140, 167; G.C.§§ 8623-4(5), 8623-13, 8623-15, 8623-37 to 8623-40, 8623-67; 25 N.P.(N.S.) 225.

B. Subscriptions to Stock. (4, 22, 32)

Corporations, 57 to 71.

Gates' Ohio Corporation Manual, §§ 10, 13, 19, 110, 120, 127; G.C.§§ 8623-10, 8623-20, 8623-27; 15 O.S. 225; 26 O.S. 673; 33 O.S. 107; 43 O.S. 537; 97 O.S. 232; 116 O.S. 424; 118 O.S. 10; 20 App. 156.

[*References are to Bates' Compact Ohio Digest.*]

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Corporations, 74 to 86.

Gates' Ohio Corporation Manual, §§ 24, 31, 36, 117 to 119, 126, 130, 131, 222; G.C.§§ 8623-19, 8623-26, 8623-30, 8623-31, 8623-122; 10 O. 91; 51 O.S. 83; 56 O.S. 181; 85 O.S. 43; 92 O.S. 44.

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Gates' Ohio Corporation Manual, §§ 32, 39, 41, 45, 53, 96, 127, 131, 132, 135, 136, 144, 387, 3°8; O. Const. Art. 8, § 6; G.C. §§ 5348-2, 5348-2a, 8623-27, 8623-31, 8623-32, 8623-35, 8623-36, 8623-44, 8673-1 to 8673-22.

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Gates' Ohio Corporation Manual, §§ 14, 23, 33, 48, 50, 104, 138, 178, 224; G.C.§§ 8623-4(4), 8623-38, 8623-78, 8623-124; 47 O.S. 141; 110 O.S. 59.

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Gates' Ohio Corporation Manual, §§ 9, 44, 135, 163; G.C.§§ 8623-35, 8623-63; 62 O.S. 189; 114 O.S. 231; 17 App. 103; 19 App. 243; 11 C.C.(N.S.) 335; 19 C.C.(N.S.) 584.

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Gates' Ohio Corporation Manual, §§ 10, 15, 19, 20, 43, 46, 47, 54, 56, 59, 61, 70, 79, 82, 111, 112, 134, 142 to 153, 177; G.C. §§ 8623-11, 8623-12, 8623-34, 8623-42 to 8623-53, 8623-77.

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47 O.S. 116; 7 App. 488; 19 C.C. 449; 18 C.C.(N.S.) 429; 6 O.F.D. 144.

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Gates' Ohio Corporation Manual, §§ 21, 53, 56, 57, 70, 72, 111, 150, 155 to 162, 462, 463; G.C.§§ 8623-11, 8623-50, 8623-55 to 8623-62, 12138, 12139; 62 O.S. 589; 13 C.C. 547; 18 C.C.(N.S.) 509.

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Corporations, 283 to 292.

Gates' Ohio Corporation Manual, §§ 9, 42, 44, 54, 56, 120, 132, 133, 135, 146, 155, 162, 229; G.C.§§ 8623-20, 8623-32, 8623-33, 8623-46, 8623-55, 8623-62, 8623-129.

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Gates' Ohio Corporation Manual, §§ 48, 57, 58, 64, 223, 224, 228, 415; G.C.§§ 8623-123, 8623-124, 8623-128.

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Corporations, 316 to 323.

Gates' Ohio Corporation Manual, §§ 210, 223, 495; G.C.§§ 8623-110, 8623-123, 13321; 16 O.S. 599; 56 O.S. 181; 94 O.S. 32.

IX. RECORD OF ACCOUNTS; STATEMENTS.

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Gates' Ohio Corporation Manual, §§ 58 to 64, 163, 164, 222, 223, 227, 228, 491, 493; G.C.§§ 8623-63, 8623-64, 8623-122, 8623-123, 8623-127, 8623-128, 13105-1, 13175.

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Gates' Ohio Corporation Manual, §§ 18, 108, 229, 423, 438 to 446; G.C.§§ 6397, 8623-8, 8623-129, 11272, 11275, 11288, 11290, 11292, 11358, 11416; 60 O.S. 256; 63 O.S. 83; 15 App. 437.

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Gates' Ohio Corporation Manual, §§ 18, 108, 414, 415, 494, 496, 500; G.C.§§ 6391 et seq, 8623-8, 13320, 13322, 13607; 70 O.S. 140; 2 C.C.(N.S.) 537.

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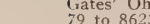
XIV. FOREIGN CORPORATIONS. (2, 25, 33)



Corporations, 472 to 494.

Gates' Ohio Corporation Manual, §§ 76, 239 to 256; G.C.§§ 178 to 194; 74 O.S. 168; 114 O.S. 149; 114 O.S. 361; 25 N.P.(N.S.) 263; 183 Fed. 133.

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Gates' Ohio Corporation Manual, §§ 197 to 216; G.C.§§ 8623-97 to 8623-116; 38 O.S. 281; 53 O.S. 1; 63 O.S. 547; 21 N.P.(N.S.) 569.

Definitions

CORPORATION.—A corporation is "an artificial being, invisible, intangible and existing only in contemplation of the law." Peculiarities of a corporation are:

1. A legal entity distinct from the members composing it;
2. The capacity of continued existence independent of the lifetime of its members;
3. The capacity to contract as an individual;
4. The capacity to own property as an individual;
5. The capacity to commit torts and crimes as an individual;
6. The capacity to sue and be sued as an individual.

Gates' Ohio Corporation Manual, § 1.

DE FACTO CORPORATION.—A corporation de facto exists only if all of three elements concur, viz: (1) where there is a valid law under

which such a corporation can exist, (2) a bonafide attempt to organize under the law, and (3) actual user. State v Burial Ass'n, 8 C.C.(N.S.) 233.

COMMON SHARES.—Common shares are those which are entitled to share in the disbursement of dividends and in the distribution of assets on dissolution, but without preference. The holders of common shares also exercise proprietary powers in the corporation without preference except where another class of shares is without voting power, in which case the common shareholders are really preferred as to the proprietary corporate powers. Gates' Ohio Corporation Manual, § 15(a).

PREFERRED SHARES.—Peferred shares are entitled to a stated dividend which must be paid before any dividend may be paid on the common shares. Moreover, on dissolution the preferred shares usually must be paid in full face value before any common shares may share in such distribution. Gates' Ohio Corporation Manual, § 15(b).

PRE-EMPTION RIGHTS.—When a corporation issues and sells additional shares of stock the general rule is, even in absence of statute, that stockholders at the time the new issue is made have the right as between themselves, and in preference to any other persons, to subscribe for or purchase the new shares in proportion to the number of shares of the original stock owned by them respectively. Gates' Ohio Corporation Manual, § 44.

CUMULATIVE VOTING.—Where such method of voting is permitted, instead of registering one vote per share for each candidate, which would be the ordinary method, a shareholder may cast the entire total of his votes for one candidate. Thus the owner of five shares would ordinarily be permitted to cast five votes for each candidate. If there are three directors to be elected, the owner of the five shares would be entitled to a total of fifteen votes and, if he may vote cumulatively, he may cast all of the fifteen votes for one candidate. Gates' Ohio Corporation Manual, § 53(f).

ULTRA VIRES.—The modern technical designation, in the law of corporations, of acts beyond the scope of their powers, as defined by their charters or acts of incorporation. Bouvier's Law Dictionary, Baldwin's Revision.

DISSOLUTION.—A corporation cannot cease to exist of its own will. Its existence continued until its dissolution is ordained. The law made it and the law alone can put an end to it. It cannot deprive itself of existence by disposing of all of its assets, nor is it dissolved by ceasing to transact business. Nor is a corporation ipso facto dissolved by reason of its violation of the law relating to its corporate existence. It continues to exist until dissolved by decree of court or by voluntary act of its own, sanctioned by the state that gave it being. Gates' Ohio Corporation Manual, § 72.

OHIO STATE BAR EXAMINATIONS

QUESTIONS WITH ANSWERS

[*Arranged Chronologically.*]

(1)

Name the different classes or kinds of corporations in Ohio.

The following are the classes of corporations in Ohio:
1. Private corporations, which may be:
(a) For profit;
(b) Not for profit.
2. Public corporations which are subdivided into;
(a) Municipal;
(b) Public Quasi;
(c) Quasi Public.
Examples of these are:
1. (a) Manufacturing company; 1 (b) Fraternal society; 2 (a) A city; 2 (b) A board of education; 2 (c) A public utility, such as a gas company.

(2)

(a) How may corporate existence be proven?
(b) Upon what kind of claims may the property of a foreign corporation be attached in Ohio in the court of common pleas?

(a) "A copy of the articles filed in the office of the secretary of state certified by the secretary of state shall be prima facie evidence of the existence of the corporation named therein. * * * G.C.§ 8623-117.

The existence of a corporation is satisfactorily proved by the production of its charter, the certificate required as to paid-up stock, and the minutes of the election of its directors and the election and qualification of its officers. (Hamilton Traction Co. v. Cincinnati Traction Co., 47 B. 854, Toledo etc. St. R. Co. v. Consol. St. R. Co., 11 D. Repr. 365, Aff. in 50 O. S. 603, 36 N. E. 312).

(b) Upon claims other than a debt or demand arising out of contract, judgment or decree, or for causing damage to property or for causing death or personal injury by negligent or wrongful act. In a civil action for the recovery of money, at or after its commencement, the plaintiff may have an attachment against the property of the defendant upon any one of the grounds herein stated:

(1) Excepting foreign corporations which by compliance with the law therefor, are exempted from attachment as such, that the defendant or one of several defendants is a foreign corporation;

(2) Is not a resident of this state;

(3) Has absconded with the intent to defraud his creditors;

(4) Has left the county of his residence to avoid the service of summons;

(5) So conceals himself that a summons cannot be served upon him;

(6) Is about to remove his property, in whole or part, out of the jurisdiction of the court with the intent to defraud his creditors;

(7) Is about to convert his property, in whole or part, into money for the purpose of placing it beyond the reach of his creditors;

(8) Has property or rights in action which he conceals;

(9) Has assigned, removed, disposed of, or is about to dispose of his property, in whole or part with the intent to defraud, his creditors;

(10) Has fraudulently or criminally contracted the debt or incurred the obligation for which suit is about to be or has been brought; and

(11) That the claim is for work and labor or for necessaries.

An attachment shall not be granted on the ground that the defendant is a foreign corporation or not a resident of this state for any claim other than a debt or demand, arising upon contract, judgment or decree, or for causing damage to property or death or personal injury by negligent or wrongful act." (G. C. § 11819 as amended in 109 Ohio Laws 59).

(3)

(a) Define Ultra Vires.

(b) Whose duty is it to prosecute corporations for ultra vires acts and what kind of an action should be brought?

(a) Ultra vires is the modern technical designation, in the law of corporations, of acts beyond the scope of their powers as defined by their charters or acts of incorporation. (Bouvier's Law Dictionary, Baldwin's Revision.

An act of a corporation is ultra vires when it is beyond the chartered powers of the corporation, and is therefore said to be void. It may also be void because it is against public policy as declared by statute, or the fundamental law, or for any reason that would make a like contract of an individual void. (Railroad Co. v. Furnace Co., 37 O. S. 327, Holmes v. Hayes, 52 O. S. 617, 44 N. E. 1138).

(b) The state, by an action in Quo Warranto.

"The only method in which to test the legality of the corporate existence or the abuse of a franchise is by a proceeding in the name of the state under G.C.§ 12304." (Parkside Cemetery Association v. The Cleveland, Bedford & Geauga Lake Traction Co., 93 O. S. 161, p. 185, 112 N. E. 596).

Where a corporation of this state, in violation of the law of its creation, is doing acts against the material and substantial rights of its stockholders, this is a matter which concerns the public, and the state will intervene by a proceeding in quo warranto, and by proper order prevent the doing of such unlawful acts. State v. Ohio, etc., R. R. Co., 6 C. C. 412.

A civil action may be brought in the name of the state against a corporation:

1. When it has offended against a provision of an act for its creation or renewal, or any act altering or amending such acts;

2. When it has forfeited its privileges and franchises by non-user;

3. When it has committed or omitted an act which amounts to a surrender of its corporate rights, privileges and franchises;

4. When it has misused a franchise, privilege, or right conferred upon it by law, or when it claims or holds by contract or otherwise, or has exercised a franchise, privilege, or right in contravention of law. (G. C. § 12304).

"When directed by the governor, supreme court, or general assembly, the attorney general or a prosecuting attorney, shall commence such action. When, upon complaint, or otherwise, either of such officers has good reason to believe that any case specified in the next preceding section can be established by proof, he shall commence an action." (G. C. § 12305).

(4)

Jones signed a stock subscription contract, agreeing to buy $1,000 of stock in a corporation. He paid $200 down, and according to his subscription agreement, agreed to pay ten per cent per month until the full thousand dollars was paid. The company had accepted the subscription. Before he had paid any more on the contract, the corporation became bankrupt. After notifying Jones, the trustee in bankruptcy commenced suit to collect the $800 yet due. Jones pleaded in answer that there was a condition attached to his subscription, the condition being the company was to erect a certain building before Jones should be required to pay the balance of the contract price. Nothing in the printed or written contract showed such condition. Was it a good defense, and why?

No.

Under the general rule of evidence that a written agreement cannot be varied or added to by parol evidence, it is not competent for a subscriber to stock to allege that he is but a conditional subscriber. The condition must be inserted in the writing in order to be effectual. (Cook on Corporation, 8th Ed. 1923, Vol. 1 § 81).

Where a subscription contract is absolute on its face, it is well settled, both in equity and at law, that previous or contemporaneous parol negotiations, stipulations, terms, or agreements are not admissable in evidence to vary or add to the contract, except for the purpose of proving that the parties, at the time of consummating the agreement, intended and understood that such terms and stipulations would be incorporated in the contract, but omitted the same by accident, fraud or mistake. The rule, forbidding the introduction of parol evidence to explain, contradict, or vary a written instrument, applies to a subscription contract for stock in a corporation. Neither party is permitted to prove a different contract from that expressed in the written instrument. Under the rule, not even a separate written contemporaneous contract is admissable to change the subscription contract, as against corporate creditors. (Cook on Corporations, 8th Ed., (1923) Vol. 1, § 137).

While a written condition appearing on the face of the subscription had been held to be valid and effective, (15 O. S. 225) a secret condition, as for example that the stock shall be sold for the subscriber and the note shall not be paid, is invalid and the subscriber's note is enforceable. (Bates v. Lewis, 3 O. S. 459, see also Robinson v. 2nd Natl. Bank of Cincinnati, 9 App. 124).

(5)

What companies have the right of eminent domain in Ohio, and why?

1. Municipal Corporations;
2. Public-Quasi Corporations;
3. Quasi-Public Corporation, i. e. Private Corporations affected with a public interest.

Examples would be (1) cities, towns, etc.; (2) boards of education, counties, townships, etc.; (3) Bridge companies (G. C. § 9305); Cemetery Asscciations (G. C. § 10093); Hydraulic companies, for canals, aqueducts, etc. (G. C. § 10121); Steam Railroads (G. C. § 8759); Street, Interurban and other non-steam railroads (G. C. § 9119); Telegraph Companies (G. C. §§ 9172-9178); and Electric Light companies et al. (G. C. § 9192); and Telegraph Companies, (G. C. § 9191).

If the purpose for which land is to be used is public in its character, the legislature has power to determine for what particular purpose or purposes the power of eminent domain may be exercised. (Giesy v. R. R., 4 O. S. 309).

All these corporations cited above are affected with a public interest, and hence have the right of eminent domain.

Private property shall ever be held inviolate, but subservient to the public welfare. (Ohio Constitution, Art. 1, § 19). See 17 Ohio 340, 350.

Private corporations created for useful and public objects, although carrying on their business for private profit, may be granted the power of eminent domain. (Kemper v. Cincinnati Turnpike Co., 11 Ohio 392, State v. Sherman, 22 O. S. 412 at p. 434).

(6)

(a) What is the favorite remedy employed by the State in questioning the right of a corporation to do business?

(b) What do you understand by a franchise tax, and who can impose it?

(a) The state may object to ultra vires acts by quo warranto which is the favorite remedy employed by the state. (State v. Standard Oil Company, 49 O. S. 137, 30 N. E. 279, State v. Ohio etc Company 6 C. C. 412, 3 C. D. 516, Miller v. Ratterman, 47 O. S. 141, 165, 24 N. E. 496; State v. Loan Ass'n., 35 O. S. 258).

It is not questioned that a proceeding to forfeit the franchises of a corporation or to oust it from being a corporation can only be sustained by the state in QUO WARRANTO. It is useless to cite authorities in support of that well-settled proposition. (Parkside Cemetery Ass'n. v. Cleveland, Bedford and Geauga Lake Traction Co., 93 O. S. 161 at p. 177, 112 N. E. 596).

General Code § 12303 provides that a civil action may be brought in the name of the State against an association of persons who act as a corporation within this state without being legally incorporated. (G. C. §12303-3).

(b) A franchise tax is a tax upon the privilege of doing business within the state, and upon the privilege of recognition by the state of the corporation's existence.

The franchise of a domestic corporation is its life and existence which, with their accompanying powers, is given by the state, and this franchise being valuable, and given by the state, the state may impose a franchise tax thereon, to the amount of the value thus conferred and continued. (Gum Company v. Laylin, 66 O. S. 578, 64 N. E. 564).

A foreign corporation can do business in this state only on such conditions and terms as the state may impose, and therefore, a franchise tax may be imposed upon a foreign corporation for the privilege of doing business within the State. (Gum Company v. Laylin, 66 O. S. 578, 64 N. E. 564).

Where a corporation is incorporated by the United States, a state cannot tax its franchises; it may tax the tangible property, but not the franchise. (Cook on Corporations, 572 C.)

(7)

An Ohio corporation is indicted by the Cuyahoga county grand jury. The sheriff receives a summons and copy of the indictment and goes to the office of the corporation: (a) Upon what person may the sheriff serve the summons and indictment? (b) Can the sheriff arrest that person? (c) Can that person give bond for the corporation to appear before the proper court? State reasons for each answer. Be brief.

(a) The sheriff may serve the summons and indictment upon the president, mayor, chairman of the board of directors or trustees, or other chief officer; or if its chief officer is not found in the county, upon its cashier, treasurer, secretary, clerk, or managing agent, if none of these can be found, by a copy left at the office or usual place of business of the corporation with the person having charge thereof etc. (G.C.§§ 10238 and 11288).

"In a criminal or quasi-criminal proceeding the only way service can be obtained on a corporation is by issuing and serving a summons on one of its officers as provided in cases of indictment." (G. C. § 13607, Reinhart and Newton Co. v. State, 15 N. P. (N. S.) 92, 23 D. (N. P.) 500, affirmed Reinhart and Newton v. State, 26 C. C. (N. S.) 428).

"When an indictment is returned against a corporation, a summons commanding the sheriff to notify the accused thereof returnable on the seventh day after its date, shall issue on the praecipe of the prosecuting attorney. Such summons with a copy of such indictment shall be served and returned in the manner provided for service of summons upon such corporation in civil actions. If the service cannot be made in the county where the prosecution began, the sheriff may make service in any county in the state upon the president, secretary, superintendent, clerk, cashier, treasurer, managing agent or other chief officers or by copy left at a general or branch office, or usual place of doing business of such corporation with the person having charge thereof, such corporation on or before the return day of summons duly served, may appear by one of its officers or by counsel and answer to indictment by motion, demurrer or plea, and upon failure to make such appearance and answer the clerk, shall enter a plea of "not guilty," and upon such appearance being made or plea entered, the corporation shall be deemed thenceforth continuously present in court until case is finally disposed of. (G. C. § 13607).

(b) No.

In Ohio there is no statutory provision or authority for the arrest of such person. (Reinhart and Newton Co. v. State, 15 N. P. (N. S.) 92 at p. 94, 23 D. 500).

The indictment is against the corporation and not the officer who was served and therefore he is not personally liable and cannot be held. A corporation is a separate and distinct legal entity, apart from the members and officers who compose it. G. C. § 13496, providing for the issuance of a warrant of arrest applies to natural presons, not to corporations.

(c) No.

Giving bond for the personal appearance of an intangible being would be an impossibility. One of the reasons why an individual has to give bond is to prevent him from fleeing from justice, but a corporation being an intangible being cannot flee from the jurisdiction, and therefore there is no necessity for bail.

(8)

(a) Does a holder of preferred stock have the right to inspect the books of a corporation? (b) May a holder of common stock, upon inspection of the corporation records, make copies of the notations thereon? (c) May a holder of common stock delegate to his agent his right of inspection of the corporation records? (d) What reason or reasons must a common stockholder assert before being entitled to an inspection of the corporation records?

(a) Yes.

The books and records of such corporation at all reasonable times shall be open to inspection of every stockholder. G.C.§ 8623-63.

This section applies to holders of preferred as well as holders of common stock. (Pearce v. Atkins, 13 N. P. (N. S.) 581).

(b) Yes.

A stockholder may make copies of the books and records of the corporation; nor is he limited to one inspection of the same. Cincinnati v. Hoffmeister, 62 O. S. 189, 56 N. E. 1033.

(c) Yes.

A stockholder may have the books examined by his representative. (Blymer v. Iron Works Co.. 5 N. P. 71, 8 D. 463, Volkblatt Co. v. Hoffmeister, 62 O. S. 189, 56 N. E. 1033).

(d) None.

The motive for making the inspection is immaterial. (Blymer v. Iron Works Co., 5 N. P. 71, 8 D. 463, Volksblatt v. Hoffmeister, 62 O. S. 189, 56 N. E. 1033. Kennon v. Trust Co., 16 D. 339).

Mandatory injunction lies to enforce the right of the stockholder to inspect the books of the corporation without regard to his motive. (Ratcliff v. Auto Remedy Co., 20 N. P. (N. S.) 39, 27 D. 327).

This section does not authorize an offensive or vexatious espionage to be exercised from motives of idle curiosity, or for the promotion of evil and vicious purposes on the part of the stockholder. (Whitney v. Shipbuilding Co., 14 N. P. (N. S.) 12, 23 D. 1).

(9)

Smith, a resident of Ohio, owns a share of stock in the Cleveland Ry. Co. The stock certificate is in a safe deposit box in a New York bank. Smith wires the N. Y. Bank to mail the stock certificate to Jones at Columbus, Ohio. At the same time, Smith writes Jones as follows: 'You have been a good friend to me. I am having my New York banker send you a share of Cleveland Ry. stock. I want you to have this for yourself and you may consider it as a gift. (Signed) Smith."

Jones received the certificate and letter and shortly thereafter Smith dies. The executor of Smith's estate sues Jones to recover the stock certificate and stock.

Who should prevail? State reasons. Be brief.

Jones can keep the stock. There was a good gift inter vivos completed by delivery, providing Smith's estate was not insolvent and the gift was not in fraud of creditors. A transfer of title to shares of stock may be by delivery of the certificate and a separate document containing a written assignment of the certificate, or a power of attorney to sell, assign or transfer the same or the shares represented thereby signed by the person appearing by the certificate to be the owner of the shares represented thereby. G. C. § 8673-1(b).

(10)

A has purchased all of the stock of the XYZ company, except one share owned by B, and A has converted the corporate property to his own use. What rights, if any, has B? Give reason.

B can commence an action in the common pleas court for an accounting in equity against A.

Where a stockholder in a corporation has bought up the shares of stock of all other stockholders but one, and has converted the property of the corporation to his own use, and where such corporation has not been dissolved, but has no directory or officers or corporate organization, the stockholder whose stock was not bought up need not bring suit against the corporation for an accounting, but may bring suit for such accounting simply against the stockholder who has bought up the other stock and converted the corporate property to his own use. Amos. Dye v. J. H. Hermesch, 1 D. (N. P.) 569, 32 B. 120.

It may be contended that the corporation has not been dissolved; that the rights as to the corporate property are in

it, and that suits in regard to such corporate property should be brought in its name; and consequently, that the plaintiff has no standing to maintain this action.

But the fiction of the legal entity of the corporation should be disregarded in the case here, and the right of the plaintiff to maintain the action should be sustained under the doctrine laid down in State Ex. Sec. vs. Standard Oil Company 49 O. S. 137. That doctrine is this, namely: "The general proposition that a corporation is to be regarded as a legal entity existing separate and apart from the natural persons composing it is not disputed; but that the statement is a mere fiction, existing only in idea, is well understood and not controverted by oneyone who pretends to have accurate knowledge on the subject. All fictions of law have been introduced for the purpose of convenience, and to subserve the ends of justice. It is in this sense that the maxim "in fictione juris subsistio acquitas," is used, and the doctrine of fictions applied. But when they are urged to an intent and purpose not within the reason and policy of the fiction, they have always been disregarded by the courts. Idem. at p. 571.

(11)

A secures a judgment against the city of Zaneville for $2500. The city has no money with which to pay said judgment. How, if at all, can the judgment be collected?

A may levy on property of the city held by it for income, or for the purposes of sale not connected with the discharge of municipal functions.

In Cincinnati vs. Frost 5 B. 684 and 8 D. Repr. 107, a building had been erected on a lot belonging to a city, as an engine house, and, afer being occupied, for many years, was rented by the board of fire commissioners for purposes of revenue. It was held that the building had been originally devoted to the use of the fire dep't. and there being no evidence of any corporate act withdrawing from the use, and the property being only under the control of board of commissioners by reason of belonging to the fire dep't., it was not subject to levy under execution against the city. See Wheeler v. Cincinnati, 19 O. S. 19 and Andrews v. Holden, 12 D. (N. P.) 91.

Property of a municipal corporation held for private purposes may be subject to levy. Cincinnati v. Cameron 7 Am. L. Rec. 592. 6 D. Repr. 727.

The reason for exempting property used for public purposes, is that it would disturb public functions. Idem. in 4 B., p. 76. Dillon on Municipal Corporation p. 446.

(12)

(a) To what extent may a director of a corporation, by contract, limit or restrict the exercise of his judgment or discretion?

(b) Does public policy forbid competent parties from entering into an agreement to form a corporation and provide for its future management, and control? Why?

(c) Does voting power belong to preferred stock unless restricted in the articles of incorporation?

(a) The authorities are uniform that a director of a corporation cannot barter and sell his official discretion, nor enter into any contract whatever as to his actions in his official capacity that will in any way restrict or limit the free exercise of his judgment and discretion, or place him under any direct or powerful inducement to disregard his duty to the corporation and the stockholders in the management of the corporate affairs. Such a contract is against public policy and void. Thomas v. Matthews, 94 O.S. 32, 60, 113 N.E. 69.

(b) No.

"The presence in the contract of a stipulation as to the manner of organization of the contemplated corporation, whom the officers should be and what their compensation should be, and how the business should be managed, cannot have the effect to render the contract void or illegal. The corporation was to be organized for the conduct of a specific business; the parties to the contract were to have the entire control of the corporation when formed save that one share would be owned by a fifth person, this simply to make the organization conform to the statute. A contract looking to this result would not be against public policy for, as held in King v. Barnes, 109 N.Y. 267, 'there is no principle of public policy which forbids competent parties from entering into an agreement to form a corporation and providing for its future management and control, if the corporation is created according to statutory requirements, and the objects contemplated are lawful and proper.'" Doan v. Rogan, 79 O.S. 372, 386, 87 N.E. 263.

(c) Yes.

"Preferred stock in Ohio corporations has equal voting power with every other class unless limitations or restrictions upon such power are made by the resolution, by virtue of which the preferred stock was authorized, and any agreement, understanding, or belief to the contrary, not expressed in such resolution, is ineffective." Miller v. Ratterman, 47 O.S. 141, 24 N.E. 496; State v. Urschel, 104 O.S. 172, 135 N.E. 630; approved in Keith v. State, 113 O.S. 497, 149 N.E. 866.

In the opinion of the above case at page 186, it is said: "Nowhere do the statutes affirmatively place any limitation or restriction upon voting power of the preferred stock, and if any such limitation or restriction exists it must be by virtue of the action of the corporation itself, through its stockholders, in such manner as is provided by the general corporation laws of the state." 104 O.S. 172, 186.

(13)

(a) For what purpose may a corporation be formed in Ohio?

(b) Who may incorporate?

(c) Does the law of Ohio require any particular ending to the name of a corporation, if so, what?

(d) Where does the power to create a corporation in Ohio reside?

(a) "A corporation for profit may be formed hereunder for any purpose or purposes, other than for carrying on the practice of any profession, for which natural persons lawfully may associate themselves, provided that where the General Code makes special provision for the filing of articles of incorporation of designated classes of corporations, such corporations shall be formed under such provisions and not hereunder. Corporations for the erection, owning and conducting of sanitariums for receiving and caring for patients, their medical and hygienic treatment and the instruction of nurses in the treatment of disease and of hygiene shall not be deemed to be forbidden hereby." G.C. §8623-3.

(b) "Any number of natural persons, not less than three, a majority of whom are citizens of the United States, may become a corporation, by subscribing, acknowledging and filing in the office of the secretary of state articles of incorporation, hereinafter called articles, setting forth, etc." G.C.§ 8623-4.

(c) Yes. The statute uses the following language:

*** * * "The name of the corporation, which may begin with the word 'the' and shall end with or include the word 'company', 'corporation', 'incorporated', or 'inc.', except as otherwise provided by law." G.C.§ 8623-4 (1).**

(d) In Ohio the power to create a corporation resides in the legislature.

"Corporations may be formed under general laws; but all such laws may, from time to time, be altered or repealed." O. Const., Art. 13, § 2.

(14)

(a) The laws of Ohio make provision for what classes of stock in a corporation for profit? Briefly define and explain each class.

(b) What do you understand by common stock without nominal value or no par stock? May such stock be issued under the laws of Ohio?

(c) Is preferred stock upon liquidation or dissolution entitled to participate in accumulated surplus profits over and above the fixed dividend rate on said stock?

(a) G.C.§ 8623-4 makes provision for the creation by a corporation of any kind of shares required for any business,

and the following are simply the usual kinds of corporate shares:

1. Common shares, with or without par value;
2. Preferred shares;
3. Unissued shares;
4. Treasury shares.

Common shares are those which are entitled to share in the disbursement of dividends and in the distribution of assets on dissolution, but without preference.

Preferred shares are entitled to a stated dividend which must be paid before any dividend may be paid on the common shares.

Unissued shares are those which have been authorized but have not yet been sold to the public. They have no value in themselves and are not considered an asset of the company.

Treasury shares are shares which at one time were outstanding in the ownership of shareholders but have been acquired by the issuing corporation by gift, purchase or in liquidation of a claim. G.C.§ 8623-2 (4); Gates' Ohio Corporation Manual, § 15.

(b) No-par value stock is stock which represents the proportionate interest of the holder in the corporate assets without indication of any nominal or money value. Thompson on Corporations, 2nd Ed. 1922, p. 619, § 3447a.

The statute, G.C.§ 8623-17, authorizes a corporation to issue shares without a specified par value, but every certificate for such share must have plainly written or printed on its face the words, "Without Par Value."

(c) Not unless so specified in the certificate or articles.

"In the absence of express provision to the contrary, preferred shares are entitled to participate only in accordance with the fixed dividend rate on said stock and cannot participate in accumulated surplus profits in excess of that amount. Duwelins v. Fibre Co., 25 N.P.(N.S.) 107.

(15)

(a) What was the theory that led to the adoption of cumulative voting?

If a stockholder accumulates his vote on one ballot, thereby exhausting his voting strength, may he exercise cumulative privilege on successive ballots as long as directors remain to be elected?

(b) Can directors of corporations for profit be elected for two and three year terms?

(c) Could there be a legal provision to pay a yearly dividend of twelve per cent payable monthly on preferred stock of an Ohio corporation?

(a) 1. That the minority interests in a corporation would be protected. By means thereof it is possible for any

material minority to obtain representation on the board of directors. State v. DuBrul, 100 O.S. 272, 277, 126 N.E. 87.

2. No.

"* * * Each shareholder shall have the right to cumulate his shares and to give one candidate as many votes as the number of directors multiplied by the number of his shares, or to distribute them on the same principle among as many candidates as he sees fit.

Such right to vote cumulatively shall not be further restricted or qualified by any provisions in the articles or regulations." G.C.§ 8623-50 (3, 4).

(b) Yes, if the articles so provide.

"The articles or regulations may provide that directors be divided into two or more classes whose terms of office shall expire at different times, but no term shall continue longer than three years.

Unless the articles or regulations otherwise provide, the directors of the corporation shall hold office for one year and until their successors are chosen and qualified, subject, however, to the provisions of this act as to the creation of vacancies." G.C.§ 8623-55 (3, 4).

(c) Yes, providing it is within the maximum rate stated in the articles of incorporation for such shares.

Before the enactment of the new general corporation laws, it was provided that dividends could not be paid at a yearly rate of more than eight per cent on preferred stock. (Former G.C.§ 8668).

Now, however, in G.C.§ 8623-4, sub. 4 (2), there is the following provision: "The dividend rate on shares of any class * * *, shall be sufficiently stated if a maximum rate or amount is stated and, if subject to such maximum, the board of directors is authorized by the articles to fix or alter such rate or amount from time to time before the issuance of such shares."

(16)

X Railroad Company receives a charter from the secretary of state of Ohio authorizing it to own and operate a street car system in the city of Cleveland. It contracts with the B Company for the purchase and laying of its steel rails. The B Company is unable to get delivery of the steel because of lack of money and the X Company enters into a contract with the Steel Company guaranteeing the payment of the B Company obligation. The B Company fails to pay. Can the Steel Company hold the X Railroad Company? Give brief reasons for answer.

Yes.

Before the passage of the new corporation act, a corporation had no power to enter into contracts of guaranty, or suretyship, or otherwise lend its credit to another, unless expressly authorized by its charter or by statute, except

where the power to do so was implied from its express powers as necessary and proper in the furtherance of its legitimate business. Pollitz v. Public Util. Com., 96 O.S. 49, 117 N.E. 25.

The old statute, G.C.§ 8627, did not include the power of guaranty as one of the general powers of a corporation. But there is the following provision in the new act, specifically giving a corporation such rights: * * * "Purchase, acquire, guarantee, hold and dispose of the shares, bonds and other evidences of indebtedness, or contracts of any corporation, domestic or foreign; * * *" G.C.§ 8623-8 (7).

(17)

The X Company, authorized by its charter to conduct the business of buying and selling real estate, goes into the retail auto business. A competitor brings an action to enjoin this abuse of its corporate power. The X Company demurs to the petition. Who prevails? Give brief reasons for answer.

The X Company.

Even before the new corporation act went into effect a stranger had no right to object to the acts of a corporation because of their ultra vires character. Ehrman v. Ins. Co., 35 O.S. 324, 337.

Under the new act, G.C.§ 8623-8, last paragraph, it is provided that, "no limitation on the exercise of the authority of the corporation shall be asserted in any action between the corporation and any person, except by or on behalf of the corporation against a director or an officer or a person having actual knowledge of such limitation."

The doctrine of ultra vires has been destroyed and a corporation can now do anything which a natural person may do. See Gates' Ohio Corporation Manual, § 108 (XIV).

(18)

A, the president of a manufacturing company, recommends the purchase to his board of directors of a tract of land adjacent to the company for a sum in excess of its value, without disclosing the fact that he has an interest in said land. The company purchased the land on the president's recommendation.

What, if any, remedy has the corporation against its president? Give brief reasons for answer.

The corporation may hold the president to an accounting for the profits made by him, or may rescind the contract and restore the vendor to his former position.

The courts will uphold a sale of property by an officer or a director to the corporation where the transaction was open, fair, and honest and the corporation was adequately represented by other directors or officers. Conversely,

equity will grant relief where the officer or director concealed his ownership, or concealed or misrepresented material facts, or where the corporation was not represented by other disinterested officers or directors. 14a C.J., p. 115, § 1882 (3); Goodin v. Canal Co., 18 O.S. 169, 183; Browne v. Board Co., 20 C.C. 351, 11 C.D. 102; Kleybolte v. R. Co., Hosea 38 [aff. 5 N.P.(N.S.) 536, 11 D. 141]; Stanton v. Stanton, 272 Fed. 432; Beck v. Fishel, 16 C.C.(N.S.) 130, 26 C.D. 616; Larwill v. Burke, 19 C.C. 449, 10 C.D. 605.

(19)

A corporation failed to file with the secretary of state a certificate that the proper amount of its stated capital had been paid in. It did business for a year and then purchased two acres of land for which it paid $1,000 down and gave a mortgage for $4,000 for the balance of the purchase price. The seller failed to record the mortgage. Six months later a judgment creditor of the company established his lien against the real estate and proceeded to have it sold. The original seller sued the company and joined the judgment creditor to set aside the conveyance as a nullity because the corporation was never validly incorporated. Can he succeed? Why?

No.

The corporation was a de facto corporation. A corporation de facto exists only if three elements concur, viz: (1) Where there is a valid law under which such a corporation can exist, (2) a bona fide attempt to organize under the law, and (3) actual user. State v. Burial Ass'n, 8 C.C. (N.S.) 233, 18 C.D. 397; Bank v. Miller, 1 C.C.(N.S.) 569, 14 C.D. 198; Garwood v. Oil Co., 11 App. 96; Bartholomew v. Bentley, 1 O.S. 37; Kardo v. Adams, 231 Fed. 950.

A conveyance to a de facto corporation is valid. Accordingly if such de facto corporation is given a purchase money mortgage for such realty which is not recorded, its mortgagee loses his priority as against subsequent mortgagees, grantees, or judgment creditors of such de facto corporation; and he cannot have such conveyance regarded as a nullity. Society Perun v. Cleveland, 43 O.S. 481.

(20)

A stockholder made a contract with the company to sell thirty-three shares of its own stock to it for two pieces of land and $1,500 in manufactured products at ten per cent discount. A few weeks later, when the stockholder tendered the shares, the company refused to carry out the contract. An action was brought to enforce the contract.

Can the stockholder succeed? Why?

Not unless the articles authorize the redemption of the shares and do not prohibit such purchase. G.C.§ 8623-41 (a).

None of the other paragraphs of this section (dealing with a corporation acquiring its own shares) justify such contract on the above facts.

Prior to the present enactment it was unlawful for a corporation to deal in its own stock except where such action was necessary to avoid loss to the corporation. Morgan v. Lewis, 46 O.S. 1; Coppin v. Greenless, 38 O.S. 275; Siders v. Concrete Co., 13 C.C.(N.S.) 481, 23 C.D. 552.

However, under G.C.§ 8623-41, a corporation may be justified under several sets of circumstances in purchasing stock in its own company.

(21)

A city ordinance provided that no billboards should be constructed nearer to the street than building lines also established by ordinance. A billboard firm sued the city to enjoin it and its officers from interfering with the placing of billboards nearer to the street than the building line. Two grounds were argued: First, that the city had no power so to restrict billboards; and, Second, that the city had no power to establish a building line.

Should the injunction be granted?

No. It has been repeatedly held that ordinances establishing reasonable building lines and restricting the maintenance and erection of billboards constitute valid exercise of police power of the city, unless shown to be clearly arbitrary, unreasonable or discriminatory. This same question has been before the courts in numerous cases, and such ordinances have not been held unconstitutional, unless council is clearly without the power to enact them. The police power includes that which is necessary and reasonable to secure the peace, safety, health, morals and welfare of the public. We do not find that these ordinances are arbitrary, unreasonable or discriminatory, nor that their provisions constitute undue interference with the use of private property. State v. Hauser, 17 App. 4, 8, 9.

(22)

Under the new corporation act, when stock is issued for considerations other than money, what must be shown in order to force a stockholder whose stock appears as fully paid for, and non-assessable, to pay an additional sum for the stock which he holds, on the ground that what he paid was inadequate?

It must be shown by clear and convincing evidence, and otherwise than by proving the difference between the value of such considerations and the amount so determined, that such determination of value was knowingly and intentionally made and fixed at an amount known to the parties making the same to be greater than the fair value of such considerations to the corporation. G.C.§ 8623-25 (3).

(23)

What powers do corporations have?

Every corporation of this state, heretofore or hereafter organized, shall have the capacity possessed by natural persons to perform all acts, within or without this state.

Subject to any limitations or restrictions which may be imposed thereon by the articles, every corporation shall have authority to

Sue and be sued, contract and be contracted with;

Adopt, use, and at will alter a common seal (but failure to affix a seal shall not affect the validity of any instrument);

Purchase, acquire, hold, convey, lease, mortgage, or dispose of property, real or personal, tangible or intangible;

Borrow money and issue, sell or pledge bonds, promissory notes, bills of exchange, debentures, and other obligations and evidences of indebtedness payable at a specified time or times, or payable upon the happening of a specified event or events, whether secured by mortgage, pledge or otherwise, or unsecured;

Purchase, acquire, guarantee, hold and dispose of the shares, bonds and other evidences of indebtedness, or contracts of any corporation, domestic or foreign;

Do all acts permitted by this act and all such further acts as are necessary, convenient or expedient to accomplish its stated purposes * * *. G.C.§ 8623-8 (1, 2).

(24)

Give the necessary steps to be taken in connection with the sale of all the assets of an Ohio corporation.

What rights, if any, do stockholders have who object to the sale?

1. Proposal of sale by directors;
2. Notice of meeting to all shareholders of record, regardless of their right to vote;
3. Shareholder's meeting;
4. Affirmative vote of two-thirds (⅔) of voting power or such other proportion not less than a majority, or vote by classes, as the articles may require;
5. Sale by Board of Directors.

A corporation may, by action taken at any meeting of its board of directors sell, lease, exchange or otherwise dispose of all or substantially all of its property and assets, including its good will, upon such terms and conditions and for such considerations, which may be money, stocks, bonds, or other instruments for the payment of money or other property or considerations, as its board of directors deem expedient, when and as authorized by the affirmative vote of shareholders holding shares in the corporation entitling them to exercise at least two-thirds of the voting power on

such a proposal, or such other proportion not less than a majority, or vote by classes, as the articles may require, at a shareholder's meeting called for that purpose. Notice of such meeting shall be given to all of the shareholders of record of the corporation whether or not they shall be entitled to vote thereat. G.C.§ 8623-65 (1).

Any shareholder entitled to vote on the sale * * * of the assets of a corporation * * *, and any shareholder of record who was absent from the meeting or who was not entitled to vote, may object in writing within twenty days after the vote authorizing any such action, and at that time demand in writing the payment of the fair cash value of his shares, and the corporation shall, within thirty days after the receipt of such demand, unless it is withdrawn with the consent of the corporation, pay to such shareholder upon surrender of his certificate or shares, the fair cash value of his shares as of the day before such vote was taken * * *.

In case of disagreement as to such fair cash value, either the corporation * * * , or the dissatisfied shareholder may, within six months after such demand is made, but not thereafter, petition the court of common pleas of the county in which such corporation * * * has its principal office to appoint, and thereupon such court shall appoint three appraisers to determine the fair cash value of the shares as aforesaid. The award of the appraisers, or a majority of them, if not objected to in writing within ten days after it is filed in the clerk's office, shall be confirmed by the court and judgment shall be rendered accordingly. If such award shall be objected to in writing within ten days, the court shall, on such evidence as may be adduced, determine summarily such fair cash value and render judgment therefor. Any such judgment shall be payable only upon the deposit with the clerk of the certificates for the shares of such dissatisfied shareholder, to be surrendered to the corporation * * * on payment of such judgment. The costs of the proceeding shall be adjudged against, and paid by the corporation * * * unless the court shall find that it offered to pay the dissatisfied shareholder an amount not less than the award, in which case the costs shall be adjudged against and paid by such shareholder. Such a proceeding shall be deemed to be a special proceeding within the meaning of section 12258 of the General Code, and final orders therein may be vacated, modified or reversed as provided in title 6 of the General Code.

Two or more dissatisfied shareholders may join as plaintiffs or defendants in any such proceeding.

Unless and until such sale * * * shall be abandoned, the shareholder making such demand in writing shall cease to be a shareholder as to such shares and shall have no rights with respect to such shares, except the right to receive payment therefor as aforesaid. Each shareholder who does not

object in writing and demand in writing payment of the fair cash value of his shares, in the manner and at the time hereinbefore provided, shall be concluded by the vote of assenting shareholders. G.C.§ 8623-72.

(25)

A foreign corporation created for the sole purpose of defending physicians and surgeons in civil actions for malpractice, sells contracts which entitle surgeons to such service. Can such company obtain a certificate authorizing it to transact such business in Ohio? Give reasons for answer.

No.

The business proposed is professional business, and as such is expressly prohibited to corporations by R.S. § 3235 (now G.C.§ 8623-3) of Ohio. State v. Laylin, 73 O.S. 90, 76 N.E. 567.

A corporation for profit may be formed hereunder for any purpose or purposes, other than for carrying on the practice of any profession, for which natural persons lawfully may associate themselves. G.C.§ 8623-3.

All foreign corporations, and the officers and agents thereof, doing business in this state, shall be subjected to all the liabilities and restrictions that are, or may be imposed upon corporations of like character, organized under the laws of this state, and shall have no other or greater powers. * * * G.C.§ 5508.

(26)

What right, and under what circumstances has a stockholder to inspect the books and records of a corporation? What is the proper remedy to enforce this right, if it is refused?

The books of account, lists of shareholders, voting trust agreements, if any, and the minutes of meetings of every corporation shall be open to the inspection of every shareholder at all reasonable times save and except for unreasonable or improper purposes. G.C.§ 8623-63 (2).

The proper remedy by which to enforce this right is mandatory injunction. Ratcliffe v. Auto Remedy Co., 20 N.P.(N.S.) 39, 27 D. 327; Volksblatt Co. v. Hoffmeister, 62 O.S. 189, 56 N.E. 1033; State v. Mining Co., 13 C.C.(N.S.) 100; Mortgage Co. v. Rosenbaum, 114 O.S. 231, 151 N.E. 122.

(27)

Under what circumstances, if any, are the directors of a corporation personally liable for losses sustained by the corporation?

The directors of a corporation are personally liable if they suffer corporate funds or property to be wasted or lost

by gross negligence and inattention to the duties of their trust; and an action may be maintained against them for the amount of such losses. Miesse v. Loren, 5 (N.P.) 307, 8 D. 448; approved in Glass v. Courtright, 14 N.P.(N.S.) 273, 295.

(28)

(a) Who may form a corporation and for what purposes may they be formed under the General Corporation Act of Ohio?

(b) Give the steps necessary to form a corporation and state what the articles must contain.

(a) Any number of natural persons, not less than three, a majority of whom are citizens of the United States, may become a corporation, * * *. G.C.§ 8623-4 (1).

A corporation for profit may be formed hereunder for any purpose or purposes, other than for carrying on the practice of any profession, for which natural persons lawfully may associate themselves, provided that where the General Code makes special provision for the filing of articles of incorporation of designated classes of corporations, such corporations shall be formed under such provisions and not hereunder. Corporations for the erection, owning and conducting of sanatariums for receiving and caring for patients, their medical and hygienic treatment and the instruction of nurses in the treatment of disease and of hygiene shall not be deemed to be forbidden hereby. G.C.§ 8623-3.

(b) Articles of incorporation should be subscribed, acknowledged and filed in the office of the secretary of state by the persons named in (a). G.C.§ 8623-4 (1).

The secretary of state shall record the articles so filed, and all certificates of amendment, including other certificates and agreements of consolidation relating to that corporation thereafter filed. G.C.§ 8623-6.

Upon the filing of the articles, the incorporators and their associates, successors and assigns by the name stated therein, shall, from the date of such filing, be and constitute a body corporate, with perpetual succession. G.C.§ 8623-7.

The articles must contain:

1. The name of the corporation, which may begin with the word "the" and shall end with or include the word "company", "corporation", "incorporated" or "inc.", except as otherwise provided by law.

2. The place in this state where the principal office of the corporation is to be located.

3. The purpose or purposes for which it is formed.

4. The maximum number and the par value of shares with par value, and the maximum number of shares without par value which the corporation is authorized to have outstanding; and if the shares are to be classified, the number and par value, if any, of the shares of each class and

all the designations, preferences, conversion rights, voting powers, redemption rights and other relative rights or restrictions or qualifications of each class, all of which are hereinafter sometimes designated "terms and provisions".

The dividend rate on shares of any class or the amount payable for shares of any class on redemption of such shares or on the dissolution, liquidation, consolidation or sale of the entire assets of the corporation, shall be sufficiently stated if a maximum rate or amount is stated and, if subject to such maximum, the board of directors is authorized by the articles to fix or alter such rate or amount from time to time before the issuance of such shares.

5. The amount of capital with which the corporation will begin business, which shall not be less than five hundred dollars.

6. If desired, the amount of consideration for which subscriptions to shares without par value may be received by the incorporators, and the valuation of any consideration to be received for shares either with or without par value proposed to be presently issued.

7. Any lawful provisions which may be desired for the purpose of defining, limiting and regulating the exercise of the authority of the corporation, or of the directors or of the shareholders or of any class of shareholders, or for the purpose of creating and defining rights and privileges of the shareholders among themselves. Any provision authorized to be made in the regulations of a corporation may, if desired, be made in its articles.

If the corporation is for a purpose which includes the construction of an improvement not to be located at a single place, the articles shall also set forth:

a. The kind of improvement intended to be constructed,

b. Its termini, and the counties in or through which it or its branches will pass. G.C.§ 8623-4.

(29)

(a) What is the general rule in reference to the power of a corporation to purchase its own stock?

(b) Under the General Corporation Act can a corporation acquire stock in another corporation?

(a) In most jurisdictions, it is allowed a corporation to buy its own stock, provided it does so in good faith and without injury to its creditors, and this is generally held not to work prejudice to subsequent creditors. The authority must come from the stockholders and not the courts. Thompson on Corporations, 2nd Ed., 1922, § 4075.

Prior to the present enactment it was unlawful for a corporation to deal in its own stock except where such action was necessary to avoid loss to the corporation. Mor-

gan v. Lewis, 46 O.S. 1; Coppin v. Greenless, 38 O.S. 275; Siders v. Concrete Co., 13 C.C.(N.S.) 481, 23 C.D. 552.

The conditions under which a corporation may now validly acquire its own stock are specifically set forth in G.C.§ 8623-41.

(b) Yes.

Subject to any limitations or restrictions which may be imposed thereon by the articles, every corporation shall have authority to * * * purchase, acquire, guarantee, hold and dispose of the shares, bonds and other evidences of indebtedness, or contracts of any corporation, domestic or foreign. G.C.§ 8623-8 (7).

Under the statute in its present form there is no restriction on the holding by one corporation of stock of another so long as such holding does not effect an illegal object. See G.C.§§ 6390 et seq., (anti-trust act). Gates' Ohio Corporation Manual, § 108.

(30)

(a) Are corporations liable for torts committed by them? If liable, state to what extent, and if not liable state why not?

(b) As a general rule, is a corporation liable for slander uttered by its agent?

(c) Would the fact that such slander was provoked by abusive language and conduct upon the part of the person of whom such slanderous words were spoken, and were the result simply of personal malice induced thereby, affect the liability of such corporation?

(a) In the same manner as a natural person is liable for the act of his agent or servant, a corporation is liable civilly for all torts committed by its servants or agents under its express or implied authority. The act of the servant or agent in order to impose liability upon the corporation must have been within the scope of his authority or course of his employment; but subject to this limitation it may have been without orders, or even in disobedience, of his instructions, or may have been in excess of instructions, or may even have been malicious or willful. Nor need the corporation have authorized the doing of the particular act or ratified it after it was done. 14a C.J. 765, § 2829.

The rule of responsibility, involving the liability of corporations under the maxim respondeat superior, is stated in Little Miami Rd. Co. v. Wetmore, 19 O.S. 110; Gas & Elec. Co. v. Black, 95 O.S. 42, 46, 115 N.E. 495.

(b) Yes.

A corporation is liable for slander uttered by its local managing agent while acting within the scope of his employment and in the performance and furtherance of his principal's business, touching the matter in which he was

empowered to act. Gas & Elec. Co. v. Black, 95 O.S. 42, 115 N.E. 495.

(c) Yes.

If the slanderous words used were provoked by abusive language and conduct upon the part of Black, and were the result simply of personal resentment and malice induced by such provocation, then under the Wetmore case (19 O.S. 110), there would be no liability on the part of the principal. Gas & Elec. Co. v. Black, 95 O.S. 49, 115 N.E. 495.

(31)

(a) Explain the difference between a de facto corporation and a de jure corporation.

(b) How may the validity of the formation of a de facto corporation be attacked and by whom must such proceedings be brought?

(a) A corporation may exist in fact without being legally constituted. Such a corporation is called a corporation de facto, as distinguished from a corporation de jure. A corporation de jure is a corporation which is in all respects legal; a body which has a right to corporate existence, and to exercise corporate powers, of which it cannot be deprived, even by the state in a direct proceeding, contrary to the terms of its charter. A de facto corporation, on the other hand, is an association which actually exists for all practical purposes as a corporate body, but which, because of failure to comply with some provision of the law, has no legal right to corporate existence as against a direct attack by the state. 14 C.J., p. 204, § 215.

(b) It may be attacked by a civil action in quo warranto, in the name of the state.

This action may be brought against a corporation when it has exercised a franchise, privilege, or right in contravention of law. G.C.§ 12304-4.

"A de facto corporation may exercise all of the powers and incur all of the responsibilities of a de jure corporation, and is not subject to attack on account of its faulty organization except by direct action by the state." Society Perun v. Cleveland, 43 O.S. 481, 3 N.E. 357; State v. Express Co., 1 N.P., 259, 2 D. 257; Gaff v. Flesher, 33 O.S. 107; Hagerman v. B & L Ass'n, 25 O.S. 186; Johnson v. Bentley, 16 O. 97; Bank v. Renick, 15 O. 322; Webb v. Moler, 8 O. 548; Durrell v. Belding, 9 C.C. 74, 4 C.D. 263.

(32)

X subscribed in writing to the stock of a corporation and delivered such subscription to the president of such company upon an oral agreement that the same shall not become binding upon X until the happening of a future event which never occurs, and the company becomes insol-

vent. Under such state of facts could the trustee in bankruptcy enforce such subscription? Why?

No.

The manual delivery of a written instrument may always be shown by parol evidence to have been on a condition which has not been fulfilled, in order to avoid its effect. One who signs a written subscription to the capital stock of a corporation and delivers the same to an authorized agent of said company upon an oral agreement that the same shall not become binding upon said subscriber until the happening of a future event, which never occurs, is not liable to a trustee in bankruptcy representing the creditors of said company, unless it be shown that the creditors extended credit to said company in reliance upon said subscription and without notice of said oral condition. Martin v. Steinke, 22 App. 146.

(33)

The General Code of Ohio specifically provides that before a foreign corporation transacts business in Ohio it must comply with certain requirements therein provided. What effect does the failure of a foreign corporation to comply with such provisions have upon its right to continue to transact business in this state?

It has no effect upon its right to continue to transact business in this state.

That it is not the policy of this state to treat foreign corporations doing business in this state without compliance with our statutes as non-existent or legally incompetent is clearly indicated by G.C.§ 5508, where it is specifically provided that its contracts made in this state without compliance shall be enforceable against it, but not by it. A foreign corporation, doing business in Ohio without compliance with the Ohio statutes, having been made liable by G.C.§ 5508, upon its contracts so made, it is clear that it is not the purpose of the existing legislation to withdraw or withhold the comity permitting foreign corporations to do business in this state, but only to impose such penalties as will the more nearly insure compliance with the Ohio requirements.

G.C.§ 178 contains this provision:

No such foreign corporation doing business in this state without such certificate shall maintain an action in this state upon a contract made by it in this state until it has procured such certificate. The significant thing in this paragraph, in so far as it indicates a policy, being the use of the word "until" instead of "before", thus withholding the right of recourse to the courts until compliance, rather than permanently denying it for all business done before compliance, and evincing a purpose to secure compliance with the statutory provisions rather than a purpose to pre-

vent such corporation from coming into and doing business in this state. Soap Co. v. Bogue, 114 O.S. 149, 152, 153, 150 N.E. 743.

(34)

(a) What is meant by no par stock?

(b) When may a corporation organized under the laws of Ohio commence business?

(c) May shares having par value be issued and sold for more than par value, and if so, when?

(d) May shares having par value be issued and sold at less than par value, and if so, when?

(a) Non-par value stock is stock which represents the proportionate interest of the holder in the corporate assets without indication of any nominal or money value. Thompson on Corporations, 2nd Ed. (1922), § 3447a.

(b) When the amount of capital specified in its articles as the amount of capital with which it will commence business has been paid in.

No corporation shall commence business until the amount of capital specified in its articles as the amount of capital with which it will commence business has been paid in. G.C.§ 8623-13.

(c) Yes, when the board of directors authorize it. * * * The board of directors may authorize the issuance of shares with par value at a price greater than par * * *. G..C.§ 8623-16 (1).

(d) Yes.

* * * A corporation by action of its board of directors may issue and sell shares having par value or securities convertible into shares having par value, or give options to purchase shares having par value, for an amount of consideration less than the par value of such shares or of such shares as may be issued upon the conversion of such securities or exercise of such options if

(1) The corporation has been in existence more than two years; and

(2) The board of directors shall find that such shares cannot be sold at par; and

(3) The board of directors shall fix a price for such shares at less than par and cause them to be offered to existing shareholders at such price; and

(4) All of the shares so offered shall not have been purchased by existing shareholders.

Whereupon such unpurchased shares may be issued and sold at not less than the price at which such shares were offered to shareholders, less reasonable compensation for the sale or underwriting of such shares; or securities convertible into such shares may be issued and sold and the price of such shares on conversion may be fixed at an amount equal to or greater than the price at which such

shares were offered to shareholders; or options may be given for such time and on such conditions as may be stated, to purchase such shares at a price not less than that at which such shares were offered to shareholders * * *. G.C.§ 8623-16 (2, 3, 4).

(35)

What is a charter? Does it partake of the nature of a law or a contract? If a contract, name all the parties affected thereby.

A charter is a grant made by the sovereign either to the whole people or to a portion of them, securing to them the enjoyment of certain rights.

The name is ordinarily applied to government grants of powers or privileges of a permanent or continuous nature, such as incorporation, territorial dominion or jurisdiction. Bouvier's Law Dictionary, Baldwin's Revision.

It partakes of the nature of a contract.

It was held in the celebrated case of Trustees of Dartmouth College v. Woodward, 4 Wheat; 17 U.S., 518, decided by the Supreme Court of the United States in 1819, that a charter granted by a state, granting corporate powers, constitutes a contract between the state and the corporation, the obligations of which cannot be impaired by an alteration, amendment or repeal of such charter without the consent of the corporation, unless the power of amendment or repeal was expressly reserved by the state. For more than one hundred years the doctrine of that case has been accepted and applied and is today firmly established as a legal principle. Allen v. Scott, 104 O.S. 436, 439, 135 N.E. 683; Steubenville v. Trac. Co., 31 O.C.A. 513, 516.

As will be seen from the above cases, the parties affected thereby are the state and the corporation. Supra.

(36)

A was one of the five directors and was also president of the Globe Metal Co. and had been receiving a salary of $6,000 per year. At a regular meeting of the board of directors a resolution was presented increasing the salary of A to $10,000 per year. A and two other directors voted in favor of the resolution and two directors voted against it. The resolution was declared carried. Thereupon S, a stockholder, brought an action to restrain the corporation and its officers from paying A the increased salary. Who should prevail, and why?

S, the stockholder, should prevail.

Under the general principle which prohibits a director from acting for the corporation in a matter in which he is adversely interested, which is enforced with great vigor against officers voting themselves salaries, it is well settled

that, where a salary or compensation is voted to a director, the vote is illegal, if it is carried only by including the vote of the director who receives the pay or salary. Nor, according to the better view, can a director form part of a quorum to act on a proposition to fix his salary or compensation * * *.

Although the directors are given general power to enact by-laws, they cannot enact a by-law conferring on themselves the authority to fix salaries, and under the authority thus conferred proceed afterward to vote themselves salaries. 7 R.C.L., p. 466, § 447, cited in Briggs v. Grocery Co., 116 O.S. 343, 347, 156 N.E. 494.

An officer is without authority to fix or increase his own salary. Directors are precluded from fixing, increasing, or voting compensation to themselves for either past or future services by them as directors or officers, unless they are expressly authorized to do so by charter or by the stockholders. The director who claims compensation for his services, being disqualified from voting on the question, if he is necessary to make up a quorum of the board, or if his vote is necessary to the result, the resolution will be void. 14a C.J. 143, Supra, at p. 347.

(37)

A was engaged in the lumber business and became largely indebted to various creditors who were pressing him for payment of his accounts. He then caused to be duly incorporated "The A Lumber Company" in which four of his relatives became stockholders, owning one share each for which they paid cash. A transferred all his property to the A Lumber Company, which then conducted the business. B, a creditor of A, having secured a judgment against A, brought suit against A and the A Lumber Company, seeking to set aside the conveyance from A to the A Lumber Company, upon the ground that it was made to hinder and delay the creditors of A. Should B recover? Give reasons for answer.

B should recover.

In contemplation of law a corporation is a legal entity, an ideal person, separate from the real persons who compose it. This fiction, however, is limited to the uses and purposes for which it was adopted * * *. But the fiction cannot be abused; a corporation cannot be formed for the purpose of accomplishing a fraud or other illegal act under the guise of the fiction; and when this is made to appear, the fiction will be disregarded by the courts and the acts of the real parties dealt with, as though no such corporation had been formed. Bank v. Trebein, 59 O.S. 316, 52 N.E. 834.

Criminal Law

(Numbers in parenthesis refer to answers following.)

I. NO COMMON LAW CRIMES IN OHIO. (42a)

Criminal Law, 3, 4.

1 O. 132; 10 O.S. 287; 42 O.S. 383; 66 O.S. 59.

II. RESPONSIBILITY FOR CRIME; DEFENSES.

A. Capacity in General.

Criminal Law, 10, 73.

25 O.S. 217; 35 O.S. 52; 45 O.S. 535.

B. Insanity. (39)

Criminal Law, 11, 77; Insane Person, 33 to 48.

G.C.§§ 13608 to 13615; 2 O.S. 54, 70; 5 O.S. 77; 12 O.S. 494; 23 O.S. 146; 71 O.S. 146; 102 O.S. 431; 23 App. 474; 5 D. 703.

C. Drunkenness. (6)

Criminal Law, 78; Homicide, 19, 38; Insane Person; 40.

5 O.S. 77; 25 O.S. 369; 43 O.S. 332; 109 O.S. 77; 119 O.S. 189.

D. Alibi.

Criminal Law, 79; Homicide, 35, 52.

39 O.S. 215; 103 O.S. 541; 107 O.S. 399, 405; 119 O.S. 231; 25 App. 273; 26 App. 53.

E. Entrapment. (9)

Criminal Law, 7.

14 C.C.(N.S.) 289; 15 C.C.(N.S.) 241; 11 N.P.(N.S.) 593.

III. AIDERS AND ABETTORS OR ACCESSORIES. (1, 23)

Criminal Law, 14 to 20; Homicide, 20.

G.C.§ 12380; 12 O.S. 146; 42 O.S. 150; 77 O.S. 523; 50 O.S. 277; 94 O.S. 258.

IV. LIMITATION OF PROSECUTIONS.

Criminal Law, 28, 29, 186.

G.C.§ 12381; 22 O.S. 442; 4 O.F.D. 228; 8 N.P.(N.S.) 617.

V. FORMER JEOPARDY. (22a, 26, 40)

Criminal Law, 32 to 41.

O. Const. Art. 1, § 10; G.C.§ 13630; 42 O.S. 383; 69 O.S. 247; 89 O.S. 383; 111 O.S. 657.

VI. TREASON.

Treason, 1 et seq.

G.C.§§ 12392, 12393, 13673; 66 O.S. 35; 7 O.F.D. 714.

[*References are to Bates' Compact Ohio Digest.*]

VII. MURDER.

A. Intent. (30)

Homicide, 2 to 6.

G.C.§ 12400; 8 O.S. 98, 110; 29 O.S. 186; 42 O.S. 150; 51 O.S. 331; 12 App. 217.

B. Malice.

Homicide, 7 to 9.

G.C.§ 12400; 8 O.S. 98; 22 N.P.(N.S.) 65; 1 D. Repr. 407.

C. First Degree Murder. (23b, 25, 30, 36, 42c)

Homicide, 10 to 17.

G.C.§§ 12399 to 12402-1; 75 O.S. 52; 106 O.S. 151; 113 O.S. 377; 115 O.S. 542; 116 O.S. 265; 116 O.S. 495.

D. Second Degree Murder. (8, 18, 36)

Homicide, 18.

G.C.§§ 6212-14, 12403; 8 O.S. 131; 10 C.C. 84; 12 C.C. 467.

VIII. VOLUNTARY MANSLAUGHTER. (18, 36)

Homicide, 21 to 23, 28 to 34.

G.C.§ 12404; 25 O.S. 369; 29 O.S. 186; 103 O.S. 434.

IX. INVOLUNTARY MANSLAUGHTER. (18, 34, 36)

Homicide, 24 to 27.

G.C.§ 12404; 66 O.S. 59; 82 O.S. 154; 105 O.S. 94.

X. ASSAULTS AND ASSAULT AND BATTERY.

Assault and Battery, 18 to 30; Homicide, 36 to 36-6.

G.C.§§ 12420 to 12423-1, 12428; 14 O.S. 437; 34 O.S. 377; 43 O.S. 376; 10 N.P.(N.S.) 110; 11 N.P.(N.S.) 183.

XI. JUSTIFIABLE AND EXCUSABLE HOMICIDE.

A. In General.

Homicide, 37 to 38-1.

40 O.S. 333; 7 App. 185; 21 C.C. 43.

B. Self Defense. (16)

Homicide, 39 to 40-3.

G.C.§ 12400; 1 O.S. 66; 10 O.S. 598; 26 O.S. 162; 100 O.S. 66; 114 O.S. 299; 115 O.S. 308; 17 C.C. 406.

XII. ABORTION.

Abortion, 1 to 9.

G.C.§§ 12412, 12412-1, 13033; 2 O.S. 219; 17 O.S. 110; 89 O.S. 35; 26 App. 435.

XIII. RAPE.

Rape, 1 et seq.

G.C.§§ 12413 to 12415, 13672; 14 O. 222; 35 O.S. 52; 45 O.S. 249; 113 O.S. 46; 2 D. Repr. 255.

XIV. MAYHEM.

Mayhem, 1 et seq.

G.C.§§ 12416, 12419; 38 O.S. 272; 45 O.S. 177; 11 C.C.(N.S.) 495.

XV. KIDNAPPING.

Kidnapping, 1, 2.

G.C.§§ 12424 to 12427; 43 O.S. 567.

XVI. LARCENY AND POCKET PICKING. (13, 29, 32)

Larceny, 1 to 41.

G.C.§§ 12447 to 12449, 12451, 12452, 12455, 12460, 12461, 13691; 29 O.S. 184; 31 O.S. 219; 85 O.S. 317; 113 O.S. 153.

XVII. ROBBERY. (23a)

Robbery, 3 et seq.

G.C.§ 12432; 1 O.S. 422; 42 O.S. 383, 386; 106 O.S. 151.

XVIII. RECEIVING STOLEN PROPERTY.

Receiving Stolen Property, 1 et seq.

G.C.§§ 12450, 13579; 3 O.S. 575; 23 O.S. 130; 59 O.S. 350; 90 O.S. 352; 11 C.C.(N.S.) 364.

XIX. FORGERY AND COUNTERFEITING. (7a, 10)

Counterfeiting, 1 et seq; Forgery, 1 et seq.

G.C.§§ 13083 to 13103; 26 O.S. 510; 114 O.S. 190; 115 O.S. 340.

XX. EMBEZZLEMENT. (11, 32b, 35)

Embezzlement, 1 et seq.

O. Const. Art. 2, § 5; G.C.§§ 12467 to 12474, 12873 to 12880, 13691; 18 O.S. 366; 59 O.S. 491; 21 App. 33; 14 N.P.(N.S.) 223; 21 N.P.(N.S.) 437.

XXI. FALSE PRETENSES. (7b, 15, 28)

False Pretenses, 2 et seq.

G.C.§§ 12450, 13104, 13691; 5 O.S. 280; 77 O.S. 468; 113 O.S. 153; 116 O.S. 111; 21 App. 403; 21 App. 417.

XXII. BURGLARY.

Burglary, 1 et seq.

G.C.§§ 12437 to 12446; 26 O.S. 400; 34 O.S. 199; 34 O.S. 426; 37 O.S. 108; 64 O.S. 270; 74 O.S. 65.

XXIII. ARSON.

Arson, 3 et seq.

G.C.§ 12433; 21 O.S. 233; 103 O.S. 1; 16 App. 8.

XXIV. PERJURY.

Perjury, 1 et seq.

O. Const. Art. 5, § 4; G.C.§ 12842; 26 O.S. 81; 39 O.S. 130; 39 O.S. 496; 66 O.S. 35; 117 O.S. 426; 7 N.P. 450.

XXV. BRIBERY.

Bribery, 1 et seq.

O. Const. Art. 5, § 4; G.C.§§ 12823 to 12830, 12931, 12932, 13316; 39 O.S. 132; 54 O.S. 24; 107 O.S. 475; 113 O.S. 187.

XXVI. OFFENSES AGAINST CHASTITY.

Adultery, 1 et seq; Bigamy, 1 et seq; Disorderly House, 1 et seq; Obscenity, 1 et seq; Seduction, 9 to 11; Sodomy, 1 et seq.

G.C.§§ 13022 to 13043, 13671, 13672; 12 O.S. 552; 22 O.S. 541; 29 O.S. 542; 29 O.S. 651; 38 O.S. 374; 102 O.S. 62.

XXVII. CRIMINAL CONSPIRACY. (1)

Conspiracy, 13 to 18.

G.C.§§ 6396, 12409, 12810; 86 O.S. 229; 23 App. 421; 20 C.C. 430; 17 C.C.(N.S.) 380; 4 O.F.D. 162.

XXVIII. CRIMINAL PROCEDURE.

A. Jurisdiction. (1, 21)

Criminal Law, 23 to 25.

G.C.§§ 13422 to 13425, 13520 to 13522; 40 O.S. 440; 67 O.S. 494; 96 O.S. 114; 103 O.S. 33; 26 N.P.(N.S.) 593.

B. Arrest, Examination, Bail and Indictment. (4, 17, 18, 31)

Criminal Law, 44 to 50; Indictment and Information, 1 et seq.

O. Const. Art. 1, § 9; G.C.§§ 13492 to 13607; 43 O.S. 340; 54 O.S. 365; 58 O.S. 676; 79 O.S. 63; 108 O.S. 287.

C. Pleas, Arraignment and Venue. (22b, 37)

Criminal Law, 51 to 60.

G.C.§§ 13608 to 13641; 8 O.S. 599; 22 O.S. 405; 27 O.S. 280; 102 O.S. 431; 113 O.S. 418; 114 O.S. 190.

D. Juries, Testimony, Trial. (3, 5, 10, 11, 12, 14, 24, 25, 27, 41)

Criminal Law, 193 to 308.

O. Const. Art. 1, § 10; G.C.§§ 13642 to 13687; 70 O.S. 11; 106 O.S. 481; 116 O.S. 265; 119 O.S. 231.

E. Verdict, Sentence, and Pardon. (19, 42c)

Criminal Law, 311 to 314, 343 to 379.

G.C.§§ 13688 to 13744; 24 O.S. 134; 26 O.S. 162; 42 O.S. 426; 102 O.S. 26; 24 App. 208.

F. New Trials, Motions in Arrest and Error. (8, 26, 33, 38)

Criminal Law, 316 to 340.

G.C.§§ 13745 to 13764; 19 O.S. 573; 20 O.S. 572; 27 O.S. 572; 42 O.S. 537; 59 O.S. 218; 73 O.S. 208.

Definitions

MALICE.—The doing a wrongful act intentionally without just cause or excuse. A wicked and mischievous purpose which characterizes the perpetration of an injurious act without lawful excuse. A conscious violation of the law, to the prejudice of another. That state of mind which prompts a conscious violation of the law to the prejudice of another. Bouvier's Law Dictionary, Baldwin's Revision.

PREMEDITATION.—A design formed to commit a crime or to do some other thing befcre it is done. Bouvier's Law Dictionary, Baldwin's Revision.

BATTERY.—Any unlawful beating, or other wrongful physical violence or constraint, inflicted on a human being without his consent. Bouvier's Law Dictionary, Baldwin's Revision.

ASSAULT.—An act done towards the commission of a battery. Fox v. State, 34 O.S. 380.

AGGRAVATED ASSAULT.—One committed with the intention of committing some additional crime. Simple assault is one committed with no intention to do any other injury. Bouvier's Law Dictionary, Baldwin's Revision.

ATTEMPT.—An endeavor to accomplish a crime carried beyond mere preparation, but falling short of execution of the ultimate design in any part of it. Bouvier's Law Dictionary, Baldwin's Revision.

ARSON.—The crime of arson, at common law, consisted in the malicious and willful burning, by a person, of the house or out-house of another. * * * But we have never had any common-law offenses in this state. Our statute against the burning of buildings is not confined to the common-law offense of arson, or felonious burning. It seems to comprehend that kind of burning which, at common law, constituted merely a high misdemeanor, as well as those which were arson, or felonies at common law. * * * Our statute was meant to embrace the case of a tenant willfully and maliciously burning buildings, the property of another, of which he was the tenant, or in possession. Allen v. State, 10 O.S. 301, 302.

HOMICIDE.—The killing any human creature. Bouvier's Law Dictionary, Baldwin's Revision.

EXCUSABLE HOMICIDE.—Excusable homicide is that which takes place under such circumstances of accident or necessity that the party cannot strictly be said to have committed the act willfully and intentionally, and whereby he is relieved from the penalty annexed to the commission of a felonious homicide. Bouvier's Law Dictionary, Baldwin's Revision.

FELONIOUS HOMICIDE.—Felonious homicide is that committed willfully under such circumstances as to render it punishable. Bouvier's Law Dictionary, Baldwin's Revision.

JUSTIFIABLE HOMICIDE.—Justifiable homicide is that committed with full intent, but under such circumstances of duty as to render the act one proper to be performed. Bouvier's Law Dictionary, Baldwin's Revision.

FELONIES AND MISDEMEANORS.—Offenses which may be punished by death, or by imprisonment in the penitentiary, are felonies; all other offenses are misdemeanors. Throckmorton's General Code of Ohio, § 12372.

CRIMES.—For definitions of other various crimes, as defined by the Ohio General Code, see the General Code section references under the numerous subjects following.

[*At the time of going to press an act "to revise and codify the Code of Criminal Procedure of Ohio" was under consideration by the General Assembly. If this bill should become a law, copies of the act may be obtained from the publishers for a nominal sum.—Ed.*]

OHIO STATE BAR EXAMINATIONS

QUESTIONS WITH ANSWERS

[Arranged Chronologically.]

(1)

A and B were walking on opposite sides of a cut of freight cars out in a lonely freight yard after night, rattling and examining the seals of the cars carefully. Two policemen were secreted on one side of the right-of-way in the weeds. A, who was on that side noticed them by the light of the moon, and started down toward them. The two policemen both drew their pistols upon A, made him throw up his hands and held him there under arrest. B came through between the cars and noticing that A was under arrest, started to run. One of the policemen fired at him with his pistol. B returned the fire, one shot going through the policeman's cap. B got away. A was indicted and arraigned for aiding one John Doe (B) in shooting with intent to kill. It was proved upon the trial that A had not uttered one word nor made a move after throwing up his hands. At the end of the State's evidence, A's attorney moved the court to direct a verdict. What was the court's duty in the premises and why?

It was the duty of the court to grant the request of the defendant.

It was not shown that A had entered into a common conspiracy to commit an unlawful act, or that in fact A knew B was there, or that they had joined together for a common design.

But even had it been shown that A and B were engaged in a common conspiracy, the result would have been the same for the following reason:

In order to constitute an attempt, there must be a specific intent to commit the particular crime at the time of the act. Clark on Crimnal Law 3rd Ed. p. 138, § 55 (c).

But in the present case this intent was manifestly absent as evidenced by the fact that the defendant was at that instant under total subjection. Clark says at page 148; to do an act with intent to commit one crime cannot be an attempt to commit another crime, though it might result in such other crime. And again at page 150; Clark says, "Of course, if a person gives up his evil purpose before doing an act sufficient to constitute an attempt, he is not guilty, for there has been no attempt."

(2)

An affidavit is filed before B, justice of the peace of Eden Township, Seneca County, State of Ohio, setting forth that A had broken into an inhabited dwelling in Marion

county, Indiana. A, at the time of filing the affidavit, was in Seneca county, Ohio. Has the justice jurisdiction to hear the matter and commit the accused to jail? If so, why?

Yes.

"A justice of the peace shall be conservator of the peace and have jurisdiction in criminal cases throughout the county in which he is elected and where he resides, on view or on sworn complaint, to cause a person, charged with the commission of a felony or misdemeanor, to be arrested and brought before himself or another justice of the peace, and, if such person is brought before him, to inquire into the complaint and either discharge or recognize him to be and appear before the proper court at the time named in such recognizance or otherwise dispose of the complaint as provided by law." G. C. § 13422.

Jurisdiction of criminal cases of justices of the peace is merely preliminary and confined to examination and commitment for trial; it comprehends all offenses and extends throughout the county. Walker's American Law, p. 128.

"On demand, the governor, when authorized by the constitution of the United States, may deliver to the executive authority of another state or territory a person charged therein with treason, felony or other crime committed therein." G. C. § 109.

If the governor decide to comply with the demand for the surrender of a person charged with an offense committed in another state or territory, he shall issue a warrant to the sheriff of the county in which the person so charged may be found, commanding him forthwith to arrest and bring such person before a judge of the supreme court, of the court of appeals, or of the common pleas court, to be examined on the charge. G. C. § 113.

"Upon the return of the warrant by the sheriff with the person so charged in custody, the judge, before whom the person so arrested is brought, shall proceed to hear and examine the charge. Upon proof by him adjudged sufficient, he shall commit such person to the jail of the county for a time to be fixed by him in the order of commitment; thereupon such judge shall cause notice to be given to the executive authority making such demand, or to the agent duly appointed and authorized to receive the fugitive." G. C. § 114.

On payment of costs by the agent, and the deposit of a sum of money with the clerk of the court, equal to ten cents a mile from the place where the arrest was made to the place for prosecution, the fugitive shall be delivered to such agent to be returned for prosecution. If the agent does not appear within the time so fixed, pay the costs, and make such deposit, the sheriff shall discharge the person so imprisoned. If the supposed fugitive is not found guilty of the crime charged in the warrant, the deposit shall be paid

to him; but, upon the conviction of the fugitive of the crime so charged, such sum shall be paid to the agent making the deposit. G. C. § 115.

So while the Ohio Code provides the right for a justice to hear the complaint and hold him for extradition, the constitution of the United States (Article VI of the amendments) provides that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously determined by law. Hence he could not be tried in Ohio, but would have to be sent to Indiana.

(3)

(a) Define a Crime. (b) Define Misdemeanor. (c) Define Criminal Law. (d) What class of cases under criminal jurisdiction in Ohio may be tried without a jury?

(a) A crime is a wrong to one in his person, property or reputation, or a breach of a statutory rule of such importance to the public, that the state takes cognizance of it and punishes it by an action in its own name.

A crime may be generally defined as the commission or ommission of an act which the law forbids or commands under pain of a punishment to be imposed by the state in a proceeding in its own name. Clark on Crimnal Law, p. 1.

A crime is an act or omission in violation of a public law either forbidding or commanding it. 4 Bl. Comm. 5.

(b) Misdemeanors are offenses which may not be punished by death or imprisonment in the penitentiary. G. C. § 12372.

(c) "Criminal Law is that branch of jurisprudence which treats of crimes and offenses," (as prescribed by statute in Ohio). Bouvier's Law Dictionary, Baldwin's Revision.

The criminal law is that branch of the law which defines crimes, treats of their nature, and provides for their punishment. Crim. L. 16 C. J., § 1.

(d) It has long been the settled doctrine of this state confirmed by repeated decisions of all our courts, that where the penalty imposed by criminal statute, is merely a fine, the right of trial by jury as guaranteed by the constitution does not apply. Inwood v. State 42 O. S. 186, State ex rel Smith v. Smith 69 O. S. 196, 68 N. E. 1044, State v. Borham 72 O. S. 358, 74 N. E. 220 Fol. in Hoffrichter v. State, 102 O. S. 65, 130 N. E. 157.

"A statute which authorizes a penalty by fine only, upon a summary conviction under a police regulation or of an immoral practice prohibited by law, although imprisonment, as a means of enforcing the payment of the fine is authorized, is not in conflict with either Section 5 or 10 of Article I of the Ohio Constitution, on the ground that no provision

is made for a trial by jury in such cases." Inwood v. State, 42 O. S. 186.

(4)

(a) A was arrested by the police department in an Ohio City without any affidavit having been filed against him. It was suspicioned that he had something to do with the death of B of Chicago, Illinois. No criminal charge had been placed against him in Illinois. The excuse for his arrest was a telegraph communication from the prosecuting attorney of Cook County, Illinois, asking the police department to locate and apprehend him. He was confined in the city jail and then taken out and for three hours subjected to the so-called Third Degree. Did the authorities of the Ohio city have a right to make the arrest, under this information, and why?

(b) Your services are secured by the boy's parents to represent him. The police officials refused to set the young man at liberty. What should you do for him, and what is the procedure you should adopt?

(a) Yes.

"When a felony has been committed, any person without warrant, may arrest another whom he has reasonable cause to believe is guilty of the offense, and detain him until a warrant can be obtained." G. C. § 13493.

"When a person has been arrested without a warrant is held for more than a reasonable time in which to procure a warrant, he has an action for false imprisonment against the officer or person detaining him." Leger v. Warren 62 O. S. 500, 57 N. E. 506.

The facts here indicate that there was sufficient cause to believe him guilty of the felony, and he was not detained beyond a reasonable time. "A police officer who believes or has reasonable grounds for believing that a felony has been committed, may arrest a suspected person without a warrant; but shoud he discover that he has made a mistake in the identity of the prisoner, he should release him at once." Tracey v. Coffey 8 C. C. (N. S.) 88, 18 C. D. 579.

(b) A proceeding in Habeas Corpus should be started. "A person unlawfully restrained of his liberty, or a person entitled to the custody of another, of which custody he is unlawfully deprived, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment, restraint or deprivation." G. C. § 12161.

"The writ of habeas corpus may be granted by the Supreme Court, the Court of Appeals, the Common Pleas Court, the Probate Court, or by a judge of either." G. C. § 12162.

Hence, file a petition in any of the above courts, conforming to the following section.

"Application for the writ shall be by petition, signed and verified either by the party for whose relief it is intended, or by some person for him, and shall specify:

1. That the person in whose behalf the application is made is imprisoned, or restrained of his liberty;

2. The officer, or name of the person by whom he is so confined or restrained. If both are unknown or uncertain, he may be described by an assumed appellation. The person who is served with the writ shall be deemed the person intended;

3. The place where he is so imprisoned or restrained, if known;

4. A copy of the commitment or cause of detention of such person shall be exhibited, if it can be procured without impairing the efficiency of the remedy; or, if the imprisonment or detention is without legal authority, such fact must appear. G. C. § 12164.

When a petition therefor is presented, if it appears that the writ ought to issue, a court authorized to grant the writ, must grant it forthwith. G. C. § 12166.

(5)

A and B committed a burglary. They broke into an inhabited dwelling during the night time. B turned state's evidence. It was the only evidence against A except that some of the stolen property was found in A's garage. A was tried separately. Counsel for A requested the court to charge the jury to, "act upon such testimony with the greatest care and caution, subject it to the most careful examination in the light of all the other evidence in the case, and the jury ought not to convict on such testimony, unless a full and careful examination thereof has satisfied them beyond the existence of a reasonable doubt of its truth and that they can safely rely upon it."

The court refused to charge as requested. Did the court err, or not, and why?

Yes. The court erred in refusing to charge the jury as requested.

The testimony of an accomplice in crime should be very cautiously received and suspiciously scrutinized by the jury. It would be unsafe to convict upon the uncorroborated testimony of an accomplice. In giving the charge to the jury at p. 675, Judge McCarty says: "I call attention to the fact that the testimony of an accomplice in crime should be very cautiously received, and should be suspiciously scrutinized by the jury. It would be unsafe to convict the defendant upon the uncorroborated testimony of the accomplice to any fact necessary to be proved to establish the guilt of the defendant." State v. Snell, 5 D. 670.

There is no rule of law requiring of the jury refusal to convict upon the uncorroborated testimony of an accomplice.

This doctrine is distinctly laid down by Greenleaf on Evidence, Vol. 1, Sec. 380; but he adds that judges in their discretion will advise a jury not to convict of felony upon the testimony of an accomplice alone, and without corroboration. And it is now so generally the practice to give them such advice, that its omission would be regarded as an omission of duty on the part of a judge. The court gave this usual caution to the jury; and the evidence set forth in the record does not show that that advice of the court was disregarded. State v. Reichert, 111 O. S. 698.

(6)

To what extent and under what circumstance is intoxication a defense to the crime of murder in the first degree?

It is well established in American jurisprudence that drunkenness is not a defense to crime. When all the elements of a criminal act have been proven, the accused will not, as a general rule be heard to allege his voluntary intoxication as an excuse. It is an exception to the general rule that one who is accused of a crime,the definition of which involves some specific intent, or the operation of other mental processes, intoxication, though voluntary may be considered in determining whether or not the act was intentional, or as in cases of first degree murder, involving the element of deliberation and premeditation, the fact of intoxication may be considered to determine whether deliberation and premeditation existed or not. The Ohio Statutory definition of first degree murder involves both the elements of intentional killing and deliberation and premeditation, and it has therefore been recognized by former adjudications of this court in Nichols vs. State 8 O. S. 435, Davis vs. State 25 O. S. 369, and Cline vs. State 43 O. S. 332, 1 N. E. 22, that intoxication is admissible to show that no crime has been committed, or to affect the degree or grade of the crime. Long v. State, 109 O. S. 77 at p. 86.

(7)

(a) Define the crime of forgery.

(b) A owes B the sum of fifty dollars. A can write to the extent of writing his own name, but cannot read. B presents to A for his signature a promissory note which he himself had drafted calling for the sum of $150 as an evidence of the amount due him. A signs the note.

What if any crime would B be guilty of?

(a) "Whoever, with intent to defraud, falsely makes, alters, forges, counterfeits, prints or photographs a record or other authentic matter of a public nature, a license or certificate authorized by law, a charter, letters patent, deed, lease, writing obligatory, will, testament, annuity, bond, covenant, bank bill or note, check, bill of exchange, contract;

promissory note for the payment of money or other property, or any promise to pay money conditionally, an acceptance of a bill of exchange, the number or principal sums of an accountable receipt for a note, an order, warrant, or request for the payment of money or the delivery of goods or chattels, an acquittance or receipt either for money or goods, an acquittance, erlease, or discharge of a debt, account, action, suit, demand or other thing, real or personal, a plat, draft or survey of land, transfer or assurance of money, stock, goods, chattels or other property, a letter of attorney, a power to receive money or receive and transfer stock or annuties, or to let, lease, dispose of, alien or convey goods, chattels, lands, tenements, or other estates, real or personal, or a will, order, or warrant drawn by an auditor for the payment of money at a public treasury, or, with like intent, utters or publishes as true and genuine such false, altered, forged, counterfeited, falsely printed or photographed matter, knowing it to be false, altered, forged, counterfeited, falsely printed or photographed, is guilty of forgery, and shall be imprisoned in the penitentiary not less than one year nor more than twenty years." G. C. § 13083.

Clark defines forgery thus—"Forgery is the making or altering of a writing to the prejudice of another man's right. To constitute the crime:

(1) The making or altering must be false;

(2) It must be with intent to defraud;

(3) The instrument, as made or altered, must be of apparent legal efficacy to impose a liability, or, in case of alteration, to change a liability;

(4) The alteration must be therefore material. Clark's Criminal Law, p. 385.

(b) B is guilty of obtaining money by false pretenses. "Whoever, by false pretense and with intent to defraud, obtains anything of value or procures the signature of another as maker, indorser or guarantor to a bond, bill, receipt, promissory note, draft, check or other evidence of indebtedness or whoever sells, barters or disposes of a bond, bill, receipt, promissory note, draft or check or offers so to do, knowing the signature of the maker, indorser or guarantor thereof, to have been obtained by false pretense, if the value of the property or instrument so procured, sold, bartered or disposed of or offered to be sold, bartered, or disposed of, is thirty-five dollars or more, shall be imprisoned in the penitentiary not less than one year nor more than three years, or, if less than that sum, shall be fined not less than ten dollars nor more than one hundred dollars or imprisoned not less than ten days nor more than sixty days, or both. G. C. § 13104.

(8)

Jones is on trial for murder in second degree. The trial judge charges the jury that conviction cannot be had unless they are convinced beyond all doubt of Jones' guilt. Is this charge erroneous? If so, how would you alter it? If the prisoner be acquitted, how would the state proceed to test this particular question in the higher courts?

The charge is erroneous. It should be "beyond a reasonable doubt," instead of "beyond all doubt."

To constitute murder in the second degree, an intent to kill must be established beyond a reasonable doubt. Jones v. State 51 O. S. 331, 38 N. E. 79. Bennett v. State 10 C. C. 84, 4 C. D. 129. Hagan v. State 10 O. S. 459.

It is not error for the trial court to refuse to charge that the defendant must be found guilty beyond (all) reasonable doubt. This is requiring the state to produce a higher degree of proof than necessary for a conviction, and the state is required to prove the accused guilty beyond a reasonable doubt. Collette v. State 12 App. 104.

The prosecuting attorney or the attorney general may except to a decision of the court and may present a bill of exceptions thereto, which the court shall sign, and it shall be made part of the records. G. C. §§ 13680-13681.

The purpose of a bill of exceptions, under this section, is not to obtain a reversal, but to determine the law to govern in a similar case. State v. Granville, 45 O. S. 264, 12 N. E. 803.

This section evidences a legislative intent not to authorize the state to institute proceedings in error to reverse a judgment rendered in favor of the accused in a criminal case. State v. Simmons 49 O. S. 305, 31 N. E. 34.

(9)

If one fully and freely admits the facts which constitute a felony under our laws, can he be heard to demand and secure an acquittal because he was lured by an officer of the law to commit the acts complained of?

Explain fully the circumstances under which such a defense would be available.

Yes.

Entrapment is a defense in some circumstances. If the officer induce the criminal intent and aid substantially in forming and facilitating the plan, acquittal should follow.

But if the officer merely becomes aware of the criminal plan after the accused had formed it independently, and facilitates it but slightly, there is no such entrapment as will constitute a defense.

"Entrapment which is not originated by the prosecuting attorney, or by the state or county, does not bar a prosecution for the offense into which the defendant is thus

entrapped." Diegle v. State 14 C. C. (N. S.) 289, 23 C. D. 82 (Aff. State v. Diegle 21 D. (N. P.) 557 and 11 N. P. (N. S.) 593 and aff. without opinion Diegle v. State 86 O. S. 310, 99 N. E. 1125).

"If the acts of entrapment amount to consent and the crime for which the accused is indicted is one in which consent is an excuse, then the accused cannot be convicted. If, however, the crime is one in which consent is no excuse, or the acts of entrapment do not amount to consent, then the fact that the accused was entrapped into the crime is no defense." Clark's Criminal Law 3rd Ed. p. 12.

(10)

Smith is indicted and on trial for the crime of counterfeiting. The court over the objection of the defendant permits the United States to prove that the accused has theretofore been convicted of the crime of bribery. Is such evidence admissible? If not, why not?

It is not admissible.

It is an elementary proposition of law, both sound and humane, that a person may not be convicted of the crime charged upon a certain date by showing that upon other dates, previous or subsequent, he committed other crimes and offenses, but this rule has many exceptions in certain particular lines of cases as to prior acts:

1. Where a specific intent to defraud is charged, other fraudulent acts may be offered to show fraudulent intent between the same parties, and in some cases as between different parties by the same defendant.

2. Where "scienter" or guilty knowledge is a necessary element of the offense, other criminal acts may be shown of the same or similar nature, as in the sale of adulterated foods.

3. When the various acts show a general scheme or system of criminal conduct.

4. In what are known as "sexual" crimes, such as a continuous adultery, or fornications, criminal conversation, incest and the like. State of Ohio v. Reineke 89 O. S. 390 at p. 391, 106 N. E. 52.

(11)

Brown is on trial for the crime of embezzlement. The prosecuting attorney offers to prove that a year previously the accused was convicted of the crime of embezzlement in the state of Pennsylvania. The testimony is admitted over the objections of defendant, and exceptions are taken.

Is the ruling correct, and if so, for what purpose can such testimony be admitted?

The ruling is correct. Such testimony is admissible to show "scienter."

"While evidence of other offenses of embezzlement is competent for the purpose of showing intent when criminal intent is a specific element of the crime charged, yet this evidence is of a highly dangerous character and should be admitted with great caution. A jury is never authorized to consider this evidence for any purpose whatever, until after it has found from the other evidence in the case, that the defendant has committed the acts charged in the indictment.

Evidence of other offenses may then be considered by the jury for the sole purpose of determining the intent of the accused at the time of the commission of the acts charged, and it is the duty of the trial court to so charge the jury at the time such evidence is admitted. Baxter v. State, 91 O. S. 167 at p. 171, 110 N. E. 456.

(12)

(a) May a person ever be tried when absent from the court?

(b) If a defendant escapes in the midst of a criminal trial, may the trial proceed without him?

(c) If a defendant escapes between the rendition of a verdict and the date set for sentence, may he be sentenced in his absence?

(a) Yes.

A person indicted for a misdemeanor upon request in writing subscribed by him and entered on the journal may be tried in his absence, or by the court. No other person shall be tried unless personally present. G. C. § 13676. Truman v. Walton, 59 O. S. 517, 53 N. E. 57.

(b) Yes.

If a person indicted escapes or forfeit his recognizance after the jury is sworn, the trial shall proceed and the verdict be received and recorded. G. C. § 13676.

(c) If the offense charged is a misdemeanor, judgment and sentence shall be pronounced as if he were personally present; and if a felony, the case shall be continued until the accused appears in court or is retaken. G. C. § 13676. Lieblang v. State 18 C. C. (N. S.) 179, 32 C. D. 673.

(13)

Jones was indicted for larceny. The indictment set forth that at the same time and in one transaction he had taken and carried away the following articles: One suit of clothes of the value of $25 of the personal property of John White; one suit of clothes of the value of $20 of the personal property of John Black and one suit of clothes of the value of $15 of the personal property of John Brown, all of the value of $60.

Upon trial the prosecuting attorney offered White, Black and Brown as witnesses to identify their respective properties, fix value and prove the theft.

Counsel for the defendant objected and the court ruled that the prosecution could offer testimony to prove only a theft from one of the persons named in the indictment. Was the ruling correct? State reasons. Be brief.

No, the ruling of the court was wrong. The state should be permitted to prove the identity and value of all the articles taken in the one transaction in order to fix the degree of the crime of grand larceny. To hold one for grand larceny, the value must be over thirty-five dollars. G. C. § 12447.

"It was held that the stealing of several articles from different owners at the same time, each theft being part of same transaction, might be charged as one offense." State v. Hennessey 23 O. S. 339. State v. Smith 10 D. Repr. 682, 23 B. 85, Henry v. U. S. 263 Fed. 459, 463.

(14)

In the trial of a criminal case, after the jury is impaneled and sworn, what is the order of procedure?

After the jury is impaneled and sworn, the trial shall proceed in the following order:

1. The counsel for the state must state the case of the prosecution, and may briefly state the evidence by which he expects to sustain it;

2. The defendant or his counsel, must then state his defense, and may briefly state the evidence he expects to offer in support of it;

3. The state must first produce its evidence; and the defendant shall then produce his evidence;

4. The state will then be confined to rebutting evidence unless the court, for good reasons, in furtherance of justice, permits it to offer evidence in chief;

5. When the evidence is concluded, either party may request instructions to the jury on the points of law, which shall be given or refused by the court; such instructions shall be reduced to writing if either party requests it;

6. When the evidence is concluded, unless the case is submitted without argument, the counsel for the state shall commence, the defendant or his counsel follow, and the counsel for the state conclude the argument to the jury;

7. The court, after the argument is concluded and before proceeding with other business shall forthwith charge the jury; such charge, or a charge given after the conclusion of the argument, shall be reduced to writing by the court, if either party request it before the argument to the jury is commenced. Such charge or charges, or other charge or instruction provided for in this section when so written and given, shall not be orally qualified, modified or explained to the jury by the court. Written charges and instructions shall be taken by the jury in their retirement and returned

with their verdict into court and remain on file with the papers of the case. G. C. § 13675.

(15)

What are the four essential elements of the crime of obtaining property by false pretenses?

The four elements are:

1. Whoever by false representation as to past or present fact,
2. And with intent to defraud,
3. Obtains anything of value,
4. Knowing that it was obtained by false pretense, Shall be guilty of this crime. G. C. § 13104.

A false pretense within the meaning of this section, must relate to a past event or existing fact. It does not include a representation of a future transaction. Dillinger v. State 5 O. S. 280.

The representation must be such as had a decisive influence on the mind of the party defrauded, so that without its weight he would not have parted with his property. Idem.

(16)

(a) What must be proven to make a plea of self-defense a complete defense?

(b) To what degree must the self-defense be proven?

(a) Homicide is justifiable on grounds of self-defense, where the slayer, in the careful and proper use of his faculties, BONA-FIDE BELIEVES, and has reasonable ground to believe that he is in imminent danger of death or great bodily harm and that his only means of escape from such danger, will be by taking the life of his assailant, although in fact he is mistaken as to the existence or imminence of the danger. Marts v. State 26 O. S. 162. Way v. State, 5 C. C. (N. S.) 437, 17 C. D. 1. Taylor v. State 12 C. C. (N. S.) 486, 21 C. D. 602. App. and Fol., in State v. Champion 109 O. S. 281.

(b) Self-defense must be proven by a preponderance of the evidence.

"On the trial of an indictment for the murder, the burden of proving that the homicide was excusable on the ground of self-defense, rests on the defendant, and must be established by a preponderance of the evidence." Silvus v. State, 22 O. S. 90.

"On a trial for the malicious shooting of a person with intent to kill, the burden of proving that the act was done in self-defense, rests on the accused and should be shown by a preponderance of the evidence." Weaver v. State, 24 O. S. 584.

(17)

A is a member of the Franklin county grand jury. Can A be made to testify in court as to what transpired in the grand jury room? Give reason for answer.

No.

A grand juror shall not be allowed to state or testify in court in what manner a member of the grand jury voted on a question before them or what opinion was expressed by such juror in relation thereunto. G. C. § 13570.

The decision of the jury may not be impeached by the evidence of a member of the jury; it is a common-law doctrine based upon public policy and is well settled. It has been said that, to allow such a practice would be to take up and waste the time of the court in inquiry into collateral matters instead of going ahead with the case. See, Schwindt et al v. Graeff et al 109 O. S. 404. Also, Wertz v. Railroad 30 B. 280.

And we see no reason why this reasoning should not apply with equal force to the grand jury. The courts have been very strict in allowing strangers to the grand jury to be present in the grand jury room during the expression of the views and vote of the jury. Even the court stenographer must withdraw at such a time. G. C. § 13561. Also, see State v. Mumaw, 12 D. (N. P.) 785.

(18)

Give form of charge in affidavit for manslaughter and murder in the second degree. Omit caption and verification.

The State of Ohio,.....County, ss:

Before me, A. B., personally came C. D., who, being duly sworn according to the law, deposes and says that on or about the.....day of..... at the county of....., One E. F. (Here describe the offense committed, as nearly according to the nature thereof as the case will admit:)

C. D.

Sworn to and subscribed before me, this..... day of.....

A. B. Judge.

G. C. § 13497.

An affidavit substantially in the words of the statute upon which the prosecution is based, is sufficient where the statute itself sets forth and defines the offense. Emery v. State, 3 N. P. 204, 5-D-121. Aff. State v. Emery, 55-O. S. 364, 45 N. E. 319.

The affidavit should contain such a statement of the nature and cause of the accusation as would impart to the accused reasonable information of the charge, so as to enable

him to prepare his defense. Emery v. State 3 N. P. 204, 5-D.-121. Aff. State v. Emery, 55 O. S. 364, 45 N. E. 319.

These are the offenses respectively;

"Whoever, maliciously and purposely, kills another, except in manner prescribed in next three preceding sections is guilty of murder in second degree." C. C. § 12403.

"Whoever unlawfully kills another except in the manner described in next four preceding sections is guilty of manslaughter and shall be imprisoned." G. C. § 12404.

(19)

A has been convicted of a felony. After conviction and before sentence the original indictment against A was lost.

Can a trial judge pronounce judgment?

Give reason for answer.

Yes.

The presence of the original indictment is not indispensable to the sentence of the prisoner. Mount v. State 14 Ohio 295.

The court has a copy which it can produce and use as in the case of lost instruments or pleadings. In this case the court furthermore said that if it were lost or destroyed by accident, or by the fraud or design of the accused, or stolen by him or another, and the prosecution were not in fault, its place might be supplied by copy. A copy of the indictment is not transmitted with the convict; but a copy of the sentence only. Idem. 306.

(20)

A sends a box of candy which contains poison to his home, addressed to himself, expecting and intending his wife to open the box and that death shall result from eating the candy. What crime, if any, is A guilty of, if the box of candy is not opened?

Attempt to administer poison with intent to kill.

"Whoever administers or attempts to administer poison to a person with intent to kill or injure such person, or mingles poison with food, drink or medicine, with intent to kill or injure a human being, or wilfully poisons a well, spring, cistern or reservoir of water, shall be imprisoned in the penitentiary not less than two years or more than fifteen years. G. C. § 12405.

(21)

A stands in Indiana and shoots across the state line and kills B in Ohio. What state has jurisdiction of the crime?

Ohio has jurisdiction.

In this country the general rule is that the crime shall be punished in the jurisdiction where the blow took affect.

The theory is that the person firing accompanies the bullet, in legal contemplation up to the point where it strikes. Minor on Conflict of Laws p. 204. 12 Corpus Juris 456. Clark on Criminal Law 3rd Ed. p. 487.

There is however a statute in Ohio which should be considered although it does not govern in the present case, but rather the rules of private international law govern.

"Whoever, with firearms, or by sending poison or other thing or by other means, kills or injures a person in another state or county, or whoever gives a mortal blow to a person who dies in another state or county, SHALL BE TRIED AND PUNISHED IN THE COUNTY WHERE SUCH OFFENDER WAS AT THE TIME SUCH POISON OR OTHER THING WAS SENT, OR THE FORCE WAS USED. G. C. § 13580.

(22)

(a) When is an accused person placed in jeopardy?

(b) What is a plea in bar to the indictment, and how must it be supported?

(a) When the jury has been impaneled and sworn.

I take the rule to be, that a nolle prosequi cannot be legally entered after the jury are sworn; and if a prisoner be discharged, under pretense of such entry, from the prosecution, and without his consent, it is equivalent to an acquittal, and a bar to a second indictment for the same crime. The rule should be so in principle, and we think it is so upon authority. Mount v. State, 14 O. 295, 303.

"There are decisions entitled to great respect, that a prisoner is not put in jeopardy, unless a verdict has been rendered in his case. But the weight of authority, we think, is otherwise, and we consider the law as settled in this state by Mount's case already cited." Poage v. State, 3 O.S. 229, 240; see also State v. Blair, 24 App. 413, 157 N.E. 80.

(b) It is the defendant's answer denying that the state has any cause of action.

The accused may then offer a plea in bar to the indictment that he has before had judgment of acquittal, or has been convicted or pardoned for the same offense. G.C. § 13630.

It must be supported by the record of the former conviction or acquittal for the same offense, and the accused must also prove that he is the same person who stood charged in the record. This requirement is not met by the mere attaching of the transcript to the plea, and the overruling of the plea under such circumstances is not error. Whitman v. State, 6 C.C.(N.S.) 134.

(23)

(a) A, B and C agree to rob D, and for that purpose they armed themselves with deadly weapons and met at

the house of D the person to be robbed, and to carry out their unlawful design A is left outside ready to aid and assist, while B and C enter and commit the crime agreed on. Are all guilty of robbery as principals?

(b) While B and C are inside the house attempting to consummate the robbery and in furtherance of such conspiracy purposely kill D whom they are attempting to rob, while D is resisting such effort. A, who is on the outside, did not previous to such attempt to rob, agree to or assent to the killing of D. Can A be held for murder?

(a) Yes.

(b) Yes.

If several persons agree together to rob another, and for that purpose arm themselves with deadly weapons, and meet at the house of the person to be robbed, and to carry out their unlawful design one is left outside, ready to aid and assist, while the others enter and commit the crime agreed on, all are guilty of the robbery as principals.

So, if those inside the house while attempting to consummate the robbery, and in furtherance of such conspiracy purposely kill the person they are attempting to rob, while he is resisting such attempt, and such killing is the natural and probable consequence of the common purpose, the person outside, who is aiding and assisting is equally guilty as the one striking the fatal blow, though he did not, previous to such attempt agree to or assent to such killing. Stephens v. State, 42 O.S. 150.

(24)

J was under indictment for murder. He was arrested, plead not guilty and placed in the county jail. The date for the trial was fixed. J was represented by counsel. Before date of trial J escaped from jail and was not apprehended before date of trial. Can trial proceed?

No.

It is only when the trial has commenced and the jury has been sworn that the trial can proceed without the presence of accused. A person indicted for a misdemeanor, upon request in writing subscribed by him and entered on the journal, may be tried in his absence, or by the court. No other person shall be tried unless personally present, but if a person indicted escape or forfeit his recognizance, after the jury is sworn, the trial shall proceed and the verdict be received and recorded. If the offense charged is a misdemeanor, judgment and sentence shall be pronounced as if he were personally present; and, if a felony, the case shall be continued until the accused appears in court, or is retaken. G.C.§ 13676.

(25)

(a) Is there any presumption in law that a person who has arrived at the age of discretion has sufficient capacity to form a criminal purpose?

(b) Is any presumption of guilt created by a return of an indictment?

(c) You are prosecuting attorney. C suddenly disappears from his home, and is unheard of thereafter. There are many suspicious circumstances and there is evidence tending to show that D was responsible for his disappearance and that D would have certain motives for killing C. You are urged to indict D for murder. You have been unable to find any positive evidence of whether or not C is living or dead or whether he has been in any way or manner improperly dealt with. What action would you take, and why?

(a) Yes.

The law presumes every person who has arrived at the age of discretion to be of sufficient capacity to form a criminal purpose; to deliberate and premeditate upon the acts which malice, anger, hatred, revenge, or other evil disposition might impel him to perpetrate. State v. Knapp, 50 B. 28; aff. 70 O.S. 380; Loeffner v. State, 10 O.S. 598, 616.

(b) No.

No presumption of guilt is created by the return of an indictment. The only presumption is that of the innocence of the accused, which carries with it all that a presumption of innocence implies; such presumption inures to the benefit of the accused on every material fact, follows and returns with him throughout the entire trial, and must be recognized by the jury in its deliberations. In all doubtful cases, this presumption is sufficient to turn the scale in favor of the accused. State v. Knapp, 50 B. 28, app. 70 O.S. 380.

(c) No action should be taken for the reason that the corpus delicti has not been established.

The extra judicial confessions of a person accused of crime are not of themselves sufficient to prove the body of the crime in homicide cases, but they are admissible and may be taken and used for that purpose in connection with other evidence. The "body of the crime" consists of the death of the victim, that death was caused by unlawful violence, and the connection of the accused with such unlawful violence. State v. Knapp, 50 B. 28, aff. 70 O.S. 380.

(26)

The jury, in the trial of H for receiving stolen goods, retired at 3:45 p. m. At 6 p. m. the court adjourned for the day, no word having been received from the jury. The judge afterwards told the bailiff who was in charge of the jury to discharge them at 11:00 p. m. if they had not agreed

on a verdict. At 11:30 p. m. the foreman of the jury told the bailiff that there was no chance of agreement and the bailiff discharged them and let them go home. What would you advise H to do? Afterwards over H's objections he was tried again and convicted. On error should the conviction be sustained? Why?

H should move the court for his discharge from custody for the reason that he had been "once put in jeopardy under said indictment." In case this motion is overruled and he is remanded for trial; he should except to the ruling and file his bill of exceptions.

The conviction should not be sustained on error.

In a criminal cause, the discharge of the jury without the consent of the defendant, after it has been duly impaneled and sworn, but before verdict, is equivalent to a verdict of acquittal, unless the discharge was ordered in consequence of such necessity as the law regards as imperative.

In such case, the record must show the existence of the necessity which required the discharge of the jury; otherwise, the defendant will be exonerated from the liability of further answering to the indictment. Hines v. State, 24 O.S. 134.

(27)

Smith was charged with pocketpicking. His lawyer offered no character evidence of any kind, but put Smith on the stand in his own defense. On cross-examination the prosecutor asked Smith if he had ever been arrested before. Over objection the court allowed him to answer. The prosecutor then asked if he had not been convicted of violation of the Crabbe Act. After Smith said "No", the State offered proper evidence of such a conviction, which was admitted over objection. Assuming this evidence was prejudicial, was it properly admissible, and if so, upon what theory?

Yes, as bearing upon the defendant's credibility.

No person shall be disqualified as a witness in a criminal prosecution by reason of his interest in the event thereof, as a party or otherwise, or by reason of his conviction of crime. * * * Such interest, conviction or relationship may be shown for the purpose of affecting the credibility of such witness. G.C.§ 13659.

Under G.C.§ 13659, the defendant in a criminal prosecution may be cross-examined as to his conviction of crime under state or federal laws.

If upon such cross-examination the defendant denies his conviction of such crime, the proper record of the conviction, duly authenticated, may be offered by the state in rebuttal, as bearing upon his credibility. Harper v. State, 106 O.S. 481, 140 N.E. 364.

(28)

A medium represented that she had the gift of second sight and promised to foretell the entire future life of those who patronized her. Can she be convicted under the false pretense statute? Why?

No.

A false pretense, within the meaning of the statute, must relate to a past event or an existing fact. Any representation or assurance in relation to a future transaction is not included. Dillingham v. State, 5 O.S. 280, Winnett v. State, 13 C.C. 516, 10 C.D. 245 [aff. State v. Winnett, 62 O.S. 650, 58 N.E. 1102, memo.].

(29)

A passenger in a taxicab when he paid his fare by mistake gave the driver a valuable gold pocket piece instead of a quarter. It was dark and the driver did not notice it until the next morning. He at once decided to keep it. He was caught and indicted for larceny. Would this evidence sustain a conviction? Why?

No.

Two essential elements of larceny are trespass, or asportation by trespass, and the intent to steal, and these must be simultaneous. If the possession was secured without trespass—that is, if the act of acquiring possession was lawful—then the possession remains lawful, and no subsequent act of the defendant in connection with the property can constitute larceny. Porter v. State, 28 O.C.A. 410, 411.

(30)

The testimony showed that W was trying with deliberate and premeditated malice to take the life of C, but that his blow unintentionally reached K and killed him. Is the defendant guilty of murder in the first degree? Why?

Yes.

Where a person purposely and maliciously strikes with intent to kill one person, and the blow takes effect upon and kills another, the slayer is guilty of murder. Wareham v. State, 25 O.S. 601, see 18 A.L.R. 918n.

We concede that, under the statute, intent is a necessary ingredient of murder in both the first and second degrees, but we do not concede that, in either of these degrees, the intent to kill must be directed toward the person killed. The statutory definition of murder in the first degree is: "That if any person shall purposely and of deliberate and premeditated malice * * * kill another;" whilst that of murder in the second degree is: "That if any person shall purposely and maliciously, but without deliberation or premeditation, kill another." The purpose or intent under

either of these degrees is defined to be "to kill another", not to kill any particular person; and hence, if a person purposely and maliciously strikes a blow with a deadly weapon, with intent to kill, and death ensues, this would be murder in the second degree, although the person striking missed the person against whom the blow was directed, and it took effect upon another. The intent to kill and the malice followed the blow, and if another was killed the crime is complete, and if deliberation and premeditation are added to the essential ingredients of murder in the second degree, the crime would be murder in the first degree." Wareham v. State, 25 O.S. 606, 607, see 18 A.L.R. 918n.

(31)

Assume that Richard Roe is prosecuting attorney of Huron County; that William Smith is foreman of a grand jury duly impaneled in the court of common pleas of said county; and that said grand jury returns an indictment to said court in the following words and figures:

INDICTMENT

The State of Ohio,
Huron County, ss.

COURT OF COMMON PLEAS

Of the Term of September, in the year one thousand, nine hundred and twenty-seven.

The jurors of the grand jury of the State of Ohio, within and for the body of the county of Huron, on their oaths, in the name and by the authority of the State of Ohio, do find and present that John Doe on the twentieth day of June, in the year 1927, in the night season of the same day, to wit: about the hour of one at night, in the county of Huron aforesaid, and into a certain dwelling-house of John Jones, there situate, did unlawfully, maliciously and forcibly break and enter with intent then and there and thereby unlawfully to make an assault upon said John Jones then and there being and him, the said John Jones, to strike and wound, contrary to the form of the statute in such case made and provided.

RICHARD ROE,
Prosecuting Attorney."

Said indictment was endorsed as follows:

"WILLIAM SMITH,
Foreman of the Grand Jury."

Said William Smith was the uncle of John Jones, the owner of said dwelling-house.

(a) Does said indictment contain any defects?

(b) If you think it is defective, definitely specify whatever defect or defects may exist.

(c) Assume that you are appointed by the court to defend said John Doe; he being an indigent prisoner, what course of legal procedure would you follow with reference to the defense of said prisoner under said indictment?

(a) Yes.

(b) 1. The foreman did not indorse on the indictment the words "A true bill", before he subscribed his name as foreman.

2. The indictment did not conclude with the words "Against the peace and dignity of the state of Ohio."

At least twelve of the grand jurors must concur in the finding of an indictment; and, when so found, the foreman shall indorse on such indictment the words "A true bill," and subscribe his name as foreman. G.C.§ 13571.

The style of all process shall be, "The State of Ohio"; all prosecutions shall be carried on, in the name, and by the authority, of the state of Ohio; and all indictments shall conclude, "against the peace and dignity of the state of Ohio." O. Const., Art. 4, § 20.

The remaining portion of the indictment is sufficient, charging the violation of G.C.§§ 12423, 12437.

The fact that William Smith, the foreman, was the uncle of John Jones, the owner of the dwelling-house, does not invalidate the indictment.

It has long been settled in this state that the presence of a near relative of the victim as a member of the grand jury does not invalidate an indictment against one accused of crime committed against such victim. The supreme court, in the case of State v. Easter, 30 O.S. 542, held: "It is not a good plea to an indictment for murder, that a member of the grand jury which found such indictment, was a nephew of the person who was murdered." The reason for this is well stated by Wright, J., at page 543: "The law has declared that certain qualifications are necessary. Can we go farther, and say the grand juror must also be no kin to those injured by the accused? A moment's consideration will show that this would be imposing absurd and impossible conditions. The grand jury do not know who will be accused before them, and if, upon a case being presented in which an injury has been done to some relation of a member of the jury, that member is to be disqualified, it may be necessary to have a new grand jury for every crime committed." And it has been held also, in the case of State v. Deiter, 81 O.S. 504, that a plea in abatement does not lie in such case. Zell v. State, 15 App. 446, 449.

(c) A motion to quash the indictment should be made.

A motion to quash may be made where there is a defect apparent upon the face of the record, including defects in the form of the indictment or in the manner in which an offense is charged. G.C.§ 13621.

(32)

A is an employe of B and handles the cash receipts. B furnishes a cash register with instructions that all cash received shall be deposited therein.

(a) A received $100 from a customer, placed it in the cash register and later removed it from the cash register and converted it to his own use.

(b) Upon the receipt of $100 from a customer A did not deposit it in the cash register, but instead put it in his pocket and later spent the money for his own personal needs.

(c) A customer by mistake gave A $100 instead of $90. A knew of the error but kept the additional $10 and appropriated it to his own use. What crimes, if any, did A commit under (a), (b) and (c)?

(a) Grand larceny.

Should a person employed take and convert to his own use property of his employer, * * * which he has no right or authority to have, this would be larceny as much as though unlawfully taken from another person. Stalnaker v. State, 21 N.P.(N.S.) 437, 440, see G.C.§ 12447.

(b) Embezzlement.

The essential elements of the offense, as defined by Underhill on Criminal Evidence, are as follows:

1. That the accused was the agent of the person or corporation, and that he by the terms of his employment was charged with receiving the money or property of his principal;

2. That he did in fact receive such money or property;

3. That he received it in the course of his employment; and

4. That knowing it was not his own, converted it to his own use, or the use of some third person not the true owner. Stalnaker v. State, 21 N.P.(N.S.) 437, 438, see G.C.§ 12467.

All elements were present in the above statement of facts.

(c) Petit larceny.

Having known of the error at the time of acceptance of the money, his possession thereof was wrongful from the beginning, and upon appropriation and conversion, the crime was complete. See G.C.§ 12447.

(33)

A is tried for burglary. He offered evidence of an alibi and his own testimony was corroborated by the testimony of B and C. He was convicted and sentenced. A motion for new trial was filed and overruled. During the same term of court, A learned that D, a very prominent citizen, could have testified in support of his alibi, and there-

upon files a motion for a new trial upon the ground of newly discovered evidence.

What should the ruling of the court be on his motion and why?

The motion should be overruled.

A new trial, after a verdict of conviction, may be granted on the application of the defendant, for any of the following causes affecting materially his substantial rights:

* * * * * *

5. Newly discovered evidence material for the defendant, which he could not, with reasonable diligence, have discovered and produced at the trial;

* * * * * *.

The granting of a motion for a new trial upon the ground named is necessarily committed to the wise discretion of the court, and a court of error cannot reverse unless there has been a gross abuse of that discretion. And whether that discretion has been abused must be disclosed from the entire record. The rule of procedure in this regard has been frequently announced by this court. The new testimony proffered must neither be impeaching nor cumulative in character. Were the rule otherwise the defendant could often easily avail himself of a new trial upon the ground claimed. Unless the trial court or court of error, in view of the testimony presented to the court and jury, finds that there is a strong probability that the newly discovered evidence will result in a different verdict, a new trial should be refused. State v. Lopa, 96 O.S. 410, 411, 117 N.E. 319.

The evidence in the case in issue was purely cumulative and hence a new trial should not be allowed.

(34)

In the trial of a manslaughter case where death is caused by the alleged negligent operation of an automobile, is contributory negligence on the part of the deceased a legal defense?

To what extent, if at all, can evidence be offered of decedent's negligence?

No.

For the purpose of determining the proximate, or actual cause of death.

To warrant a conviction of manslaughter, on account of the killing of a human being by the negligent operation of an automobile, the conduct of the accused must have been the proximate cause of death. While the contributory negligence of the deceased is no defense, still the conduct of the deceased must be considered in determining the proximate, or actual, cause of the death. Berry on Automobiles (2nd Ed.), § 902, cited in Prince v. State, 12 App. 347, 350, 31 O.C.A. 209; Bell v. State, 7 App. 185, 27 O.C.A. 353, 29 C.D. 48; Klug v. State, 27 L.R. 477, 479.

(35)

Smith, the president of an Ohio bank, took twenty-five thousand dollars of the money coming into his hands by virtue of his position as president, and used it for his own purposes.

Later he returned the money to the bank.

After the money had been returned, these facts were discovered and he was indicted for embezzlement.

Is he guilty?

Yes.

We hold that the fact that the accused returned the money, even if he intended to return it when he secretly appropriated it to his own use, did not bar the prosecution nor exonerate him from punishment. There are decided cases which support this judgment. State v. Baxter, 89 O.S. 269, 286, 104 N.E. 331; fol. in State v. Cameron, 91 O.S. 50, 52, 56, 109 N.E. 584; Theiss v. State, 10 App. 412, 416, 31 O.C.A. 353, 356.

(36)

Name and define the different degrees of homicide in Ohio.

1. **Murder in the first degree;**
2. **Murder in the second degree;**
3. **Manslaughter.**

Whoever, purposely, and either of deliberate and premeditated malice, or by means of poison, or in perpetrating or attempting to perpetrate rape, arson, robbery or burglary, kills another is guilty of murder in the first degree * * *.

Whoever, purposely and maliciously kills another, except in the manner described in the next three preceding sections, is guilty of murder in the second degree * * *.

Whoever unlawfully kills another, except in the manner described in the next four preceding sections, is guilty of manslaughter * * *. See G.C.§§ 12400 to 12404; State v. Mueller, 6 L.R. 542, 545, 54 B. 94.

(37)

What is meant by change in venue, and when may it be granted?

It means the transfer of the place of holding a trial from one county to another.

It may be granted if it appears to the court by affidavits, that a fair and impartial trial cannot be had therein.

G.C.§ 13636 provides: Criminal cases shall be tried in the county where the offense was committed. If it appear to the court thereof by affidavits, that a fair and impartial trial cannot be had therein, such court shall order that the accused be tried in an adjoining county.

In State v. Cox, 9 L.R. 19, it was held: "A court is without jurisdiction to grant a change of venue in a criminal case except upon a finding based upon positive proof of the impossibility of securing a fair trial in the county in which the offense was committed."

In Hawkins v. State, 27 App. 297, 161 N.E. 284, it was held: Application for a change of venue is largely within the discretion of the trial judge, and it should not be granted if fair and impartial jury can be impanelled in the county where indictment was returned.

(38)

Smith was indicted, tried and found guilty of a crime. After the jury had been charged and retired, the trial judge went into the jury room and at the request of one of the jurors explained some of the matters he had already charged them on. Neither the attorneys for the defense, the prosecutor or the accused were present at the time.

Is defendant entitled to a new trial?

Yes.

A court or judge has no right to communicate with the jury respecting the charge of the court, after the jury has retired, except publicly, and in the presence of the accused. To do so is good cause for a new trial. Kirk v. State, 14 O. 512.

(39)

A is indicted and on trial for the crime of murder. Insanity is set up as a defense. The proof showed that A had twice been adjudged insane and committed to an asylum, but that he had been adjudged therefrom some two years before the homicide.

Does the burden rest upon the State to prove that the crime was committed during a lucid interval, and if so, by what degree of proof? Or, is the burden upon the defendant to prove that he was insane at the time of the commission of the crime, and if so, by what degree of proof?

The burden is on the defendant, by a preponderance of the evidence, to prove his insanity.

Where in a trial for homicide the insanity of the accused is set up as a defense, the burden of establishing such defense by a preponderance of the evidence rests upon the defendant.

The law presumes every person sane until the contrary is shown, and in a criminal case this presumption of sanity serves the state as the full equivalent of express proof until such time as it is made to appear by a preponderance of the evidence that the defendant was insane at the time of committing the crime alleged against him.

On the trial of A, indicted for the crime of murder, it having been proved that prior to the commission of the alleged homicide he had twice been adjudged insane and committed to an asylum, but was discharged therefrom the last time nearly two years previous to the time of the homicide, counsel for defendant requested the court to give to the jury the following instruction: Proof of prior insanity throws upon the state the burden of proving the crime perpetrated during a lucid interval. It defeats the legal presumption of sanity and creates a legal presumption of continued lunacy. Held: Such instruction was properly refused. State v. Austin, 71 O.S. 317; approved in Long v. State, 109 O.S. 77, 91, 141 N.E. 641.

(40)

B was indicted for the crime of burglary. He demurred to the indictment, the demurrer was sustained and B was discharged. The State prosecuted error to the court of appeals, which court reversed the judgment of the common pleas court and the case was remanded for further proceedings. B was thereafter brought before the court of common pleas for trial and interposed a plea of former jeopardy. Should the plea be sustained, or overruled? Give reasons for your answer.

The plea should be overruled.

It is true that as a general rule error proceedings are denied the state in criminal prosecutions, because such proceedings would be vain after a verdict of acquittal. A second trial with its renewed jeopardy would be a violation of the constitutional rights of the accused. All this is well set forth by Mr. Justice Day in Kepner v. United States, 195 U.S. 100. The learned justice, however, in that case distinguishes between a review following a verdict of acquittal and a review of a case disposed of on demurrer. He says: We are not here dealing with those statutes which give to the Government a right of review upon the steps merely preliminary to a trial and before the accused is legally put in jeopardy, as where a discharge is had upon motion to quash or a demurrer to the indictment is sustained before jeopardy has attached. Such statutes have been quite generally sustained in jurisdictions which deny the right of second trial where a competent court has convicted or acquitted the accused.

The authorities are all in agreement that jeopardy does not attach until the jury is sworn. It follows, therefore, that a proceeding in error such as we have here is not a vain thing, and that if the state is right, and the indictment is sufficient, the judgment below may be reversed and a trial on the merits of the case may be had. State v. Blair, 24 App. 413, 416, 417, 157 N.E. 801.

(41)

In the trial of a criminal case, if a confession is excluded because improperly procured, but such confession brings to light facts and circumstances tending to show guilt, is the prosecution precluded from proving by other evidence the facts thus disclosed because they were brought to light by a confession that is incompetent?

Can any use be made of such confession?

Give reasons.

No, the state is not precluded.

Yes.

When a confession, inadmissible because improperly procured, brings to light facts or circumstances not otherwise known tending to show guilt, the state is not precluded from proving by other evidence the facts thus disclosed because they were brought to light by a confession which is itself incompetent, and not only may the facts so disclosed be proved, but so much of the confession as discloses those facts. Dupuis v. State, 14 App. 67, 72; citing, 3 Encyclopedia of Evidence, 341, 342, and 12 Cyc., 478.

In the opinion, at page 72, the court say:

It will be noted that the rule thus stated provides only for the proving of that portion of the confession which discloses the independent facts that are otherwise proved. In the latter part of the quotation from the charge it will be seen that the court told the jury that not only might they consider the independent facts, but so much of the confession as is corroborated by these facts. The language used by the judge in the charge has a broader scope than that indicated by the rule above stated. In fact, the language employed by the trial judge is sufficient in scope to include the ultimate fact of admitted guilt if that admission of guilt was made directly in connection with the evidence out of which the discovery of the independent fact arose, and to permit the introduction of that portion of an involuntary confession which embraced the ultimate fact of admitted guilt would manifestly admit in evidence all there is of substance in any confession.

(42)

(a) What, if any, common law crimes are recognized in Ohio?

(b) Distinguish between a crime and a tort.

(c) Under an indictment for murder in the first degree, what verdict may be returned by the jury?

(a) None.

The following positions are shown by the authorities to be impregnable:

1. In Ohio, as under the federal government, we have no common law offenses. No act, however atrocious, can be punished criminally, except in pursuance of a statute or ordinance lawfully enacted. This proposition was not established without prolonged discussion. In Ohio v. Lafferty, T. 81 (1817), it was held in an able opinion by Judge Tappan, that common law crimes are punishable in Ohio; but Judge Goodenow, a member of this court under the former constitution, in his work entitled "Historical Sketches of the principles and maxims of American Jurisprudence, in contrast with the doctrines of the English common law, on the subject of crimes and punishments" (1819), completely refuted the soundness of that view, and it is now perfectly well settled that Ohio v. Lafferty is not law. Key v. Vattier, 1 O. 132, 144; Winn v. State, 10 O. 345; Vanvalkenburgh v. State, 11 O. 404; Allen v. State, 10 O.S. 287, 301; Smith v. State, 12 O.S. 466, 469; Knapp v. Thomas, 39 O.S. 377, 385; Mitchell v. State, 42 O.S. 383, 385, 386; see also, Johnson v. State, 66 O.S. 59, 65; State v. Marcinski, 103 O.S. 613, 615.

(b) The distinction between a tort and a crime with respect to the character of the rights affected and the nature of the wrong is this: A tort is merely a private wrong in that it is an infringment of the civil rights of individuals, considered merely as individuals, while a crime is a public wrong in that it affects public rights and is an injury to the whole community, considered as a community, in its social aggregate capacity. But this distinction cannot always be relied upon in determining whether a particular act is a crime or merely a tort, for many acts which are punishable as crimes may also cause special injury to individuals, and may give rise to a civil action if they can show that the injury suffered by them is distinct from that suffered by the general public, as in the case of larceny and certain frauds, affray and assault and battery, nuisances, and many other offenses. Furthermore, many acts which were regarded as mere private wrongs and were not punished as crimes are now punished as crimes by statute. Therefore, the real distinction between a tort and a crime is to be sought for, not in a difference between their tendencies, but in the difference between the methods by which the remedy for the wrong is pursued; a wrong for which the remedy is pursued by and at the discretion of the individual injured or his representative being a tort, and a wrong for which the wrongdoer is proceeded against by the sovereign or state for the purpose of punishment being a crime. 16 C.J. 54, §§ 2, 3.

(c) 1. Not guilty;

2. Guilty of murder in the first degree; G.C.§ 12400.

3. Guilty of murder in second degree; G.C.§ 12403.

4. Guilty of manslaughter; G.C.§ 12404.

5. Guilty of shooting with intent to kill; G.C.§ 12420.

6. Guilty of shooting with intent to wound; G.C.§ 12420.

7. Guilty of assault and battery. G.C.§§ 12423, 13692; Marts v. State, 26 O.S. 162; and State v. Kerlin, 51 B. 317, 319.

Domestic Relations

(Numbers in parenthesis refer to answers following.)

I. BREACH OF PROMISE. (26)

Breach of Marriage Contract, 1 et seq.

12 O.S. 312; 27 O.S. 292; 31 O.S. 51; 49 O.S. 654; 118 O.S. 131; 3 C.C. 305; 27 O.C.A. 65.

II. MARRIAGE.

A. Nature of Obligation. (6)

Marriage, 2.

Deibel's Ohio Probate Manual, § 405; 18 O.S. 543; 25 App. 120; 12 C.C.(N.S.) 289; 7 N.P. 328.

B. Who May Marry; Ratification. (2, 3b, 12, 23)

Marriage, 3, 9, 11.

Deibel's Ohio Probate Manual, § 1292; G.C.§ 11181; 22 O.S. 271; 42 O.S. 23; 26 N.P.(N.S.) 343.

C. Common Law Marriages. (33)

Marriage, 5, 6.

Deibel's Ohio Probate Manual, § 1292(2); 10 O.S. 181; 42 O.S. 23; 85 O.S. 238; 117 O.S. 136; 26 App. 502; 12 C.C.(N.S.) 289.

III. HUSBAND AND WIFE.

A. Liability for Spouse's Torts or Crimes.

Husband and Wife, 42, 47.

Deibel's Ohio Probate Manual, § 413; G.C.§ 8002; 85 O.S. 317; 102 O.S. 105.

B. Liability for Contracts of Spouse as Agent.

Husband and Wife, 6, 7, 68.

18 C.C.(N.S.) 458; 9 N.P.(N.S.) 581.

C. Tort Liability to Spouse. (35)

Husband and Wife, 43, 47, 94.

Deibel's Ohio Probate Manual, § 408(5); G.C.§ 11245; 19 App. 302; 21 App. 110.

D. Dower, Distributive Share, Year's Allowance. (21, 33, 34)

Descent and Distribution, 31 to 36; Dower, 1 et seq; Executors and Administrators, 62 to 78.

Deibel's Ohio Probate Manual, §§ 477 to 488; G.C.§§ 8000, 8511, 8592, 8606 to 8616, 10656 to 10659, 12004 to 12025; 16 O. 191; 63 O.S. 125; 83 O.S. 162; 112 O.S. 306; 11 N.P.(N.S.) 433.

[*References are to Bates' Compact Ohio Digest.*]

E. Homestead. (16, 39)

Homestead, 1 et seq.

G.C.§§ 11730 et seq; 39 O.S. 336; 55 O.S. 138; 16 O.F.D. 9.

F. Transactions and Contracts Between Spouses. (7, 24)

Husband and Wife, 20 to 26.

G.C.§§ 7999, 8000; 7 App. 422; 26 App. 508; 27 App. 336.

G. Liability for Contracts, Support and Necessaries. (30)

Husband and Wife, 4, 72 to 80, 95, 108.

Deibel's Ohio Probate Manual, §§ 408 to 415; G.C.§§ 7997 to 8004; 89 O.S. 53; 19 App. 16; 26 App. 275; 27 App. 107.

H. Funeral Expenses.

Husband and Wife, 5, 109.

16 C.C.(N.S.) 225; 9 N.P.(N.S.) 565; 16 N.P.(N.S.) 506.

I. Wife's Earnings.

Husband and Wife, 35.

Deibel's Ohio Probate Manual, § 410(2); 89 O.S. 53; 1 App. 293; 23 C.C.(N.S.) 111.

J. Actions for Torts to Spouse, Loss of Consortium and Services.

Husband and Wife, 44, 45; Death, 24, 31.

Deibel's Ohio Probate Manual, § 408(4); G.C.§§ 7995, 10770, 10772; 34 O.S. 621; 66 O.S. 399; 85 O.S. 327; 93 O.S. 101.

K. Separation and Separate Maintenance. (24)

Husband and Wife, 26, 107 to 109.

Deibel's Ohio Probate Manual, § 411; G.C.§§ 7999, 8000, 8608; 100 O.S. 17; 113 O.S. 228; 26 App. 166; 27 N.P.(N.S.) 65.

L. Alienation of Affection. (10)

Husband and Wife, 114 to 120.

G.C.§ 11224(4); 34 O.S. 621; 42 O.S. 23; 85 O.S. 237; 111 O.S. 225; 9 App. 141; 20 App. 349.

M. Domicile. (8)

Domicile, 1 et seq.

Deibel's Ohio Probate Manual, § 307; G.C.§ 7996; 87 O.S. 72.

IV. DIVORCE AND ALIMONY.

A. Divorce. (4, 8, 11, 14)

Divorce, 1 to 57.

G.C.§§ 11979 to 11990; W. 643; 50 O.S. 726; 103 O.S. 391; 108 O.S. 473; 114 O.S. 568; 18 App. 5; 20 App. 518; 16 C.C. 302.

B. Alimony, Allowances and Disposition of Property. (14, 15, 17, 20, 21, 36)

Divorce, 59 to 101.

G.C.§§ 7995, 7997, 11991 to 12003; 19 O.S. 502; 44 O.S. 449; 7 App. 156; 17 App. 299; 24 App. 342; 26 App. 222.

C. Custody and Support of Children. (27)

Divorce, 104 to 111.

G.C.§§ 8032 to 8035; 52 O.S. 229; 65 O.S. 47; 110 O.S. 392; 28 App. 51; 7 C.C.(N.S.) 89.

V. PARENT AND CHILD.

A. Relation in General.

Parent and Child, 3.

Deibel's Ohio Probate Manual, § 408(5); 3 O. 99, 102.

B. Legitimacy of Child. (22, 33, 38)

Bastards, 1 et seq; Parent and Child, 4, 29.

Deibel's Ohio Probate Manual, §§ 467, 468, 1292(2); G.C.§§ 8590, 8591, 12110 to 12134; 43 O.S. 473; 8 App. 258; 21 App. 222.

C. Support, Education and Necessaries. (16, 27, 28, 29)

Parent and Child, 11 to 18, 27 to 33.

Deibel's Ohio Probate Manual, § 408; G.C.§§ 1648, 7997, 12429 to 12431; 97 O.S. 16; 105 O.S. 401; 26 App. 439.

D. Custody and Control of Child.

Infants, 5; Parent and Child, 5 to 10.

Deibel's Ohio Probate Manual, §§ 427, 428; G.C.§§ 10928, 12970; 32 O.S. 299; 20 C.C. 47; 19 C.C.(N.S.) 43; 27 L.R. 147.

E. Right to Services and Earnings. (16, 25)

Parent and Child, 18, 19.

Deibel's Ohio Probate Manual, § 1028; G.C.§ 10928; 3 O. 99; 29 O.S. 59.

F. Actions for Injuries to Child. (37)

Parent and Child, 20, 21.

14 O. 1; 32 O.S. 299; 43 O.S. 91; 7 N.P. 418; 29 App. 229.

G. Transactions Between Parent and Child; Property of Child.

Parent and Child, 22 to 24.

32 O.S. 239; 114 O.S. 1; 16 C.C.(N.S.) 46.

H. Liability for Torts of Child. (9b)

Infants, 21; Parent and Child, 25.

100 O.S. 186; 107 O.S. 501; 21 App. 285; 23 App. 355.

I. Emancipation.

Parent and Child, 26.

18 C.C.(N.S.) 160; 6 D. 26.

J. Adoption. (19, 31, 37)

Adoption, 1 et seq.

Deibel's Ohio Probate Manual, §§ 417 to 426; G.C.§§ 8024 to 8031, 8598; 35 O.S. 655; 41 O.S. 375; 114 O.S. 579; 116 O.S. 668.

VI. MINORS OR INFANTS.

A. Disabilities in General; Age of Majority. (4)

Infants, 1 to 4-5.

Deibel's Ohio Probate Manual, § 416; G.C.§ 8023; 12 O.S. 256; 24 N.P.(N.S.) 499.

B. Conveyances, Contracts and Necessaries. (1, 3, 5, 18, 19, 26, 32)

Infants, 8 to 12.

Deibel's Ohio Probate Manual, § 416(2); 84 O.S. 385; 20 App. 229; 19 C.D. 13; 24 N.P.(N.S.) 499; 26 N.P.(N.S.) 232.

C. Torts and Crimes. (3a, 9a, 23)

Infants, 20, 22 to 24.

Deibel's Ohio Probate Manual, § 416(3)(4); G.C.§§ 1681, 2083 to 2119-1, 2131; 98 O.S. 61; 101 O.S. 75; 113 O.S. 418.

D. Actions by or Against. (9a, 18)

Infants, 25 to 36.

G.C.§§ 11219, 11229, 11247, 11248, 11252; 53 O.S. 249; 18 App. 174; 19 App. 297.

Definitions

MARRIAGE.—A contract made in due form of law, by which a man and woman reciprocally engage to live with each other during their joint lives, and to discharge towards each other the duties imposed by law on the relation of husband and wife. Bouvier's Law Dictionary, Baldwin's Revision.

WHO MAY MARRY.—Male persons of the age of eighteen years, and female persons of the age of sixteen years. not nearer of kin than second cousins, and not having a husband or wife living, may be joined in marriage. Any such person under the age of twenty-one years must first obtain the consent of his or her parents, surviving parent or guardian. Throckmorton's General Code of Ohio, § 11181.

LEGAL RELATIONS.—A husband and wife can not by any contract with each other alter their legal relations, except that they may agree to an immediate separation, and make provisions for the support of either of them and their children during the separation. Throckmorton's General Code of Ohio, § 8000.

IN LIEU OF DOWER.—The conveyance of an estate or interest in real property, to a person in lieu of dower, to take effect on the death of the grantor, if accepted by the grantee, will bar the grantee's right of dower in the real property of the grantor. But if the conveyance was made when the grantee was within the age of minority, or during the marriage, the grantee may waive title to such real property and demand dower. Throckmorton's General Code of Ohio, § 8608.

NECESSARIES.—The term necessaries is not confined merely to what is requisite barely to support life, but includes many of the conveniences of refined society. It is a relative term, which must be applied to the circumstances and conditions of the parties. Bouvier's Law Dictionary, Baldwin's Revision.

DOMICILE.—That place where a man has his true, fixed, and permanent home and principal establishment, and to which whenever he is absent he has the intention of returning. Bouvier's Law Dictionary. Baldwin's Revision.

INFANT.—All persons of the age of twenty-one years and upward, who are under no legal disability, shall be capable of contracting respecting goods, chattels, lands, tenements, and any other matter or thing which may be the legitimate subject of a contract, and, to all intents and purposes be of full age. Throckmorton's General Code of Ohio, § 8023.

CONSORTIUM.—Company; companionship. Bouvier's Law Dictionary, Baldwin's Revision.

OHIO STATE BAR EXAMINATIONS

QUESTIONS WITH ANSWERS

[*Arranged Chronologically.*]

(1)

Jones, an infant, working for a jeweler, agreed to take goods in part payment of wages, and received a diamond ring which he lost. Can he disaffirm his contract and recover the value of his service in money, disregarding the value of the ring. Give reasons.

No.

The infant can repudiate the contract but he cannot recover for his services, as he has already been paid once. Such payment though not in money was in money's worth. Infancy may be used as a shield but not as a sword.It is submitted that this case is not analogus to Lemmon v. Beeman.

Many courts applying the principle that the privilege of an infant is intended as a shield, and not as a sword—or, in other words as a protection to the infant and not as an instrument of fraud or injustice to others—hold that an infant cannot avoid his executed contracts, whereby he has benefited, and recover what he has parted with or for what he has done unless he can and does restore the consideration he has received; and that it is immaterial that the consideration has been disposed of by him, or for any other reason cannot be returned. In other words, they hold that an infant who receives a substantial consideration for his executed contract cannot, on attaining his majority avoid the contract, and recover what he has parted with, unless he can and does place the other party in statu quo. Tiffany on Domestic Relations 3rd Ed. p. 513-514.

The case under discussion can be distinguished from Lemmon v. Beeman 45 O. S. 505, 15 N. E. 476. In that case the infant purchased personalty. In the present case there was no sale, but a contract to receive jewelry as part payment for services. There is no showing of fraud or unfair dealing with the infant. For the court to allow the infant to disaffirm his contract and recover in money for his services, would be to make an entirely new contract between the parties, one that was never contemplated. In Lemmon v. Beeman the infant was able to rescind and receive back the amount paid, but in the present case, it is manifestly impossible for the infant to recover back his consideration in specie since the consideration was services rendered.

If the infant was to be permitted to recover on that part of the contract which was paid for with jewelry without having to return the consideration, there are equally

good reasons why the infant should be permitted to recover also on the part that was paid him in actual money which he later spent. Clearly this would be unfair (in the absence of fraud on the part of the employer) since it would license every infant to recover twice on his contracts. This would be contrary to the rule that his right is a shield, not a sword.

But it should be remembered that in the sale of goods to an infant (which do not come under the class of necessaries) such infant may, before or on arriving at age, recover back the consideration paid without restoring the property sold, where it has been taken from him, whether rightfully or not, upon an execution by a third party. In such case he is not required, as a condition of his right to recover, to take steps to recover the property taken from him. It is sufficient in such case, that the property ceases to be in his possession or subject to his control. Lemmon v. Beeman, 45 O. S. 505, 15 N. E. 476.

(2)

What two important bills were passed by the recent General Assembly of Ohio (1923) under the head of this subject, one having to do with marital relations, the other with respect to infancy? What are your views with respect to these measures?

1. Who can contract matrimony. G. C. § 11181.

"Male persons of the age of eighteen years, and female persons of the age of sixteen years, not nearer of kin than second cousins, and not having a husband or wife living, may be joined in marriage. Any such person under the age of twenty-one years must first obtain the consent of his or her parents, surviving parent or guardian." 110 Ohio Laws 126, effective July 19, 1923.

2. The Age of Majority. G.C.§ 8023.

"All persons of the age of twenty-one years and upward, who are under no legal disability, shall be capable of contracting respecting goods, chattels, lands, tenements, and any other matter or thing which may be the legitimate subject of a contract, and, to all intents and purposes be of full age." 110 Ohio Laws 125, effective July 19, 1923.

Much litigation will be precipitated by the change. The legislature unfortunately made no reservation. The statute does not except females who had attained eighteen but not twenty-one on or before July 18, 1923. Does it apply to them? Is a woman who was of legal age on July 18th again an infant? The act in question comes under the police power. It is to protect those under the age of discretion. However it is submitted that the act in question governs all acts of women under twenty-one from and after July 18, 1923.

This amendment is unconstitutional to the extent that it attempts to divest females who had attained the age of 18, before such date, of the right to convey real estate. Gigger v. Kelly, 24 N. P. (N. S.) 499.

So it would seem that the law is unconstitutional until it is construed by the Supreme Court, at least insofar as it affects females who had already attained their majority.

(3)

Is a boy seventeen years of age and of normal mind liable

(a) 1. For his tort?
2. For his crime?
3. For his contract for necessaries?

(b) Can such boy
1. Make a valid marriage contract?
2. Make a valid deed or mortgage?
3. Make a valid will?
4. Enter a partnership?
5. Hold office?
6. Be a witness in a lawsuit?
7. Enter into contract of employment and recover wages?

(a) 1. Yes.

It is well established that an infant is liable for his torts in the same manner as an adult. For the reason that in an action in tort the law will regard the loss or damage of the party suffering rather than the mental attitude of the actor, it has been thoroughly established that the infant is liable for his wrongs. Chapin on Torts, p. 157, § 43. Cooley on Torts (Student's Ed.), § 22.

"An infant who sells property held by him as bailee is liable in tort. This liability is a chose in action of the bailor and a creditor's bill by a creditor of the bailor can subject such liability." 1 D. Repr. 503, 10 W. L. J. 215.

A minor is liable in tort for damages caused by his negligence in handling a gun which resulted in discharging it, and thereby caused serious injury to the plaintiff. Grau v. Magis 19 D. 856.

2. Yes.

"The juvenile court has exclusive jurisdiction over minors who are under eighteen years of age and charged with crime whether misdemeanors or felony.

Where a minor under eighteen years of age is charged with a felony it is discretionary with the juvenile judge whether he will commit him to the care of a probationary officer or the state reformatory, or bind him over to the grand jury, under the general criminal laws.

The exercise of jurisdiction by the juvenile judge in the matter of an accused minor under eighteen years of age is

prerequisite to the vesting of jurisdiction over him by the common pleas court, and where such discretion has not been exercised, but the accused has been bound over to the common pleas court by a magistrate, an indictment thereafter returned against him is void." State of Ohio v. Forrest Joiner et al, 20 N. P. (N. S.) 313, 28 D. 199. See also G. C. § 1642 for the jurisdiction of the juvenile court.

In Ohio, an infant of 17 cannot be held for the crime of embezzlement, because the statute, G. C. § 12457, specifically excludes persons under 18 years of age.

3. Yes.

"It is well settled, as a general rule, that an infant or his estate may be held liable for necessaries furnished him." Clark on Contracts, page 192, § 95.

The liability of an infant for necessaries is not contractual, but quasi contractual and his express contract for necessaries is voidable; but in some jurisdictions a recovery to the extent of their reasonable value is allowed in an action upon the express contract. Idem. § 97.

"In a suit against an infant on his express contract for necessaries, recovery can only be had for the fair value of the executed part of the contract." Text Book Co. v. Allerton 10 C. C. (N. S.) 583, 20 C. D. 352.

The rule obligating him to pay for necessaries is for the minor's own good, and is founded on public policy.

(b) I. Yes, but it is voidable.

"A contract to marry, made by an infant, stands upon the same footing as respects his right to repudiate it, as any other excutory contract that may be avoided by him. The case comes within the general rule, that the contract of an infant is voidable at his election." Rush v. Wick, 31 O. S. 521.

2. Yes, but they are voidable.

An infant's deed is not void until ratification, but transmits title until disaffirmed. Drake v. Ramsey, 5 Ohio 521.

A conveyance of land which has been executed by an infant may be rescinded by him; and a decree of a court of equity cancelling such deed is not necessary but the infant may sue at law in ejectment.' Drake v. Ramsey 5 O. S. 251, Cressinger v. Welch 15 Ohio 156. See also Card v. Patterson 5 O. S. 319; Lanning v. Brown 84 O. S. 385, 95 N. E. 921.

A mortgage executed by a minor to secure a debt for which she was in no way liable is voidable and may be repudiated in some way sanctioned by law, upon becoming of age." Hetterick v. Porter 20 C. C. 110, 11 C. D. 145.

3. No.

"A person of full age, of sound mind and memory, and not under restraint, who has property or an interest therein, may give and bequeath it by last will and testament lawfully executed." G. C. § 10503.

4. Yes, but it is voidable.

"Since the contracts of an infant are voidable and not void, he may enter into a partnership agreement, and a contract of partnership between an infant and an adult is not void, but is voidable at the infant's option. Rowley on Partnership Vol. 1, § 188.

"An infant may rescind a partnership of which he is a member. If he does he can only recover his capital less what he received from the firm, and all partnership creditors must first be paid and he cannot recover an allowance for services in the absence of express stipulations." Lyghtel v. Collins 11 D. Repr. 161, 25 B. 125.

"An infant's contract of partnership is not void, but voidable." Bates on Partnership Vol. 1, p. 153.

5. No.

"At common law as well as in modern times, infants are eligible to offices which are ministerial in their character and call for the exercise of skill and dilligence only; but they are not eligible to offices which are judicial or concern the administration of juctice." 22 Cyc. 516, § 5 Schouler on Domestic Relations, 6th Ed., § 996.

The present rule is that an infant may hold an office which is purely ministerial, but when an office requires the exercise of discretion, or the safe discharge of its duties or involves the assumption of liabilities which would not be binding on an infant, he cannot, as a rule, be appointed. He cannot hold a public office requiring the receipt and disbursement of moneys, nor can he act as administrator. Tiffany on Domestic Relations 3rd Ed. p. 467.

6. Yes.

"All persons are competent witnesses except those of unsound mind, and children under ten years of age who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly." G. C. § 11493.

7. Yes.

"An infant may enter into contract for the performance of labor or personal services, and although such contract is not binding upon him but voidable at his election, it is not void, and cannot be avoided by the other party, but the infant may recover the wages due him on the contract." 22 Cyc. 599, § 11.

When a contract to work and labor for a given time has been avoided by the obligor on the ground of his infancy, after part performance on his part, he is not precluded from recovering thereby on quantum meruit, notwithstanding that he discontinued the employment without fault on the part of his obligee. William A. Fisher v. Samuel Kissenge, 27 O. C. A. 13.

(4)

(a) What do you understand by a uniform divorce law?

(b) Can Congress constitutionally legislate on subject of divorce for the states of the Union?

(a) By a uniform divorce law is meant a law such as the Uniform Sales Act, Uniform Negotiable Instruments Act, and the like. It is a law making the granting of divorce, uniform throughout the states. Such questions belong to the states and only by agreement to incorporate provisions of this character can there be any regularity of the rights governing such cases. This law, due to the modern tendency in America to shift from place to place, will greatly add to the general welfare and happiness of the people. Due to the varying conditions in our country, such act will not be adopted soon. For a good discussion on Uniform Marriage and Divorce law, see 7 L. R. 169.

(b) No.

Congress has only such powers as are delegated to her by the states in the Federal Constitution and such power has not been granted by any amendment. For article, "Shall Congress be given power to establish uniform laws upon the subject of divorce among the States of the Union?" See 70 Central Law Journal 93.

(5)

J, an infant, is indicted for felony. He employs counsel, who defends him in the trial. Can recovery of attorney fees be had?

Yes.

This involves the question whether attorney fees would be necessaries.The infant certainly wants good counsel for his defense; and the service would be a necessity in the position in which the infant is placed.

"While it has been stated generally that attorney's services are not to be regarded as necessaries, whether attorney's services are to be considered necessaries or not, depends upon whether or not there is a necessity therefor. If such necessity exists, the infant may be bound, whether such attorney is employed to enforce or protect the civil or property rights of the infant, or to defend him in a criminal action or prosecution. If there is no necessity for the services there can be no recovery." 31 C. J. 1079 § 178-4.

An infant would be liable for services in defending him on a criminal charge. Tiffany on Domestic Relations, 1921 Ed. p. 487; Clark on Contracts, 3rd Ed., p. 197.

(6)

Is marriage a contract? If so, why? If not, why not?

No.

Marriage, in the sense of the relation of husband and wife, is a status, and not a contract. Tiffany on Domestic Relations, p. 2.

It has been said that the contract to marry, is entered at the date of the engagment, and the marriage ceremony is merely the performance of the contract, but not itself, the contract.

A contract may be terminated by mutual consent, but the marriage relation cannot be so terminated. Tiffany on Domestic Relations, p. 4.

While it has been said in numerous cases that marriage is a civil contract, this expression, it has been said, was only used to indicate that it must be founded upon the agreement of the parties and does not require any religious ceremony for its solemnization. Marriage is really something more than a contract. The consent of the parties is, of course, essential to its existence, but when the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change. Other contracts may be modified, restricted, enlarged or entirely released upon the consent of the parties, but when the marital relation is once formed the law steps in and holds the parties to various obligations and liabilities.

At common law, marriage as a status, had few elements of contract about it. For instance, no other contract merged the legal existence into one. Other distinctive elements will readily suggest themselves, which rob it of most of its characteristics as a contract and leave it simply as a status or institution. As such it is not so much the result of private agreement as a public ordination. In every enlightened government it is pre-eminently the basis of civil institutions, and thus an object of the deepest concern. In this light, marriage is more than a contract. It is not a mere matter of pecuniary consideration. It is a great public institution, giving character to our whole civil polity. Hickle v. Hickle, 6 C. C. 511 3 C. D. 552.

(7)

After marriage, A has assets of $1000 and liabilities of $10,000. He gives his wife a diamond lavalier costing $300. Can A recover the lavalier from his wife?

What rights, if any, do his creditors have?

A cannot recover the lavalier after he has once made it an absolute gift to his wife.

If it is shown that this gift was made to defraud creditors, the creditors can recover the lavalier from his wife.

"A gift is never upheld unless property clearly and beyond all doubt is retained sufficient to pay the donor's debts." Crumbaugh v. Kugler 2 O. S. 373.

Every gift, grant, or conveyance of lands, tenements, heriditaments, rents, goods or chattels, and every bond,

judgment or execution, made or obtained with intent to defraud creditors of their just and lawful debts or damages, or to defraud or to deceive the person or persons purchasing such lands, tenements, hereditaments, rents, goods or chattels, shall be utterly void and of no effect. G. C. § 8618.

Only creditors and purchasers may attack a conveyance under G. C. § 8618. Burgett v. Burgett, 1 O. 469.

A conveyance by a husband to his wife as a gift will be set aside as having been made in fraud of creditors, where it is disclosed that the husband has not sufficient assets to permit him to make a gift and is unable to pay his debts. Huwe v. Knecht, 10 App. 487.

(8)

A and his wife had their matrimonial domicile in Ohio for some years. A's wife abandoned the domicile and took up her residence in New York. A filed suit for divorce on the ground of abandonment; constructive service being made on his wife in the manner prescribed by the law of Ohio. Did the Ohio court have jurisdiction to grant the divorce? Why?

Yes.

If the defendant is not a resident of this state or his residence is unknown, notice of the pendency of the action must be given by publication as in other cases. Unless it be made to appear to the court, by affidavit or otherwise, that his residence is unknown to the plaintiff, and could not with reasonable diligence be ascertained, a summons and copy of the petition, forthwith on the filing of it, shall be deposited in the postoffice, directed to the defendant at his place of residence. G. C. § 11984.

A wife cannot obtain a separate domicile by her own wrong, so that if she deserts her husband, he may sue for divorce in any state where he is domiciled, and she, though actually resident elsewhere, will be deemed in law to be domiciled with him, thus giving the court jurisdiction of both the parties. Minor on Conflict of Laws, § 51.

(9)

(a) A is a farmer. B is a minor son and assists his father on the farm. In the fall of the year B's father sends him to burn the grass from the pasture. B takes his rifle and dog, sees a rabbit, leaves a few minutes to chase the rabbit and when he returns the fire has spread to the farm of C a neighbor, and damages valuable property. C sues B for the damages. B pleads infancy. Judgment should be for whom? Why?

(b) Could C recover from A? Why?

(a) Judgment for C. Infancy is not a defense against a tort action. A minor may reasonably be expected

to exercise that degree of care which a person of his age, intelligence, capacity, discretion, and experience would naturally and ordinarily use. 31 C. J. 1093.

An infant is responsible for his own torts, and a father cannot be held for the independent wrong of his child, but is liable if he was in any way connected with the infant's wrong doing, either actively or passively. Locker v. Ewald 8 N. P. 204, 11 D. 337.

(b) Yes, B was in the employment of, and was a servant of A. He was acting within the scope of his employment.

"The act of an agent, duly authorized, is deemed the act of his principal; and the principal therefore assumes the relations, acquires the rights, and incurs the obligations which are the proper results of the acts of the agent, done within the scope of his authority. Swan's Treatise 25th Ed. p. 334.

A parent is not liable, because of the relation, for the torts of his child; but he may be liable for torts committed as his agent or servant, or with his knowledge and acquiescence. Tiffany on Domestic Relations p. 334 § 121, 3rd Ed.

(10)

C, the father of A's wife learns that A is keeping company with men of bad repute. He warns A's wife of impending ruin and disgrace and by reason of her father's words, she leaves A and goes to live with her parents. C had been misinformed about A's company. A brings an action for alienation of affections.

For whom should judgment be given? Why?

Judgment for C, if he acted in good faith in warning his daughter and having her welfare in mind although it later turns out that he was mistaken. In bringing an action against a parent for alienation of affections, you must prove it was done maliciously.

"A wife's parents are not liable for encouraging her to separate from her husband in the honest and reasonable belief that it was necessary for her protection, although there is in fact no such necessity, yet if the motive is malice and ill will to the husband, an action lies." Holtz v. Dick 42 O. S. 23.

Parents are not liable for advising a daughter to leave her husband, or for harboring her, where they act from proper motives; and, in this class of cases, proper motives will be presumed until the contrary appears.

The same rule has been applied as in the case of parent and son. Tiffany on Domestic Relations p. 113.

There can be no law to restrain the parent from honestly and sincerely endeavoring to protect his daughter, by means of counsel and warning, from impending ruin and

disgrace, or wreck of her happiness or usefulness for life. There is a marked distinction between the rights and privileges of a parent, in such cases, and those of a mere intermeddling stranger, A father has no right to restrain his daughter from returning to her husband, if she desires to do so. On the other hand, he may lawfully give counsel and honest advise for her own good and shelter her in his own house, if she choose to remain with him. Tiffany on Domestic Relations, 3rd Ed. p. 117.

(11)

A married B and prior to their marriage B represented to A that she had not been previousy married. After living together agreeably for one year, A learns that B had been previously married and had obtained a divorce from her former husband. Can A obtain a divorce from B on the ground of false representation as to prior marriage? Give reason for answer.

No. A cannot obtain a divorce. One of the grounds for divorce in Ohio is fraudulent contract. G. C. § 11979 (6). The false representation made here, however, is not sufficient to allow a divorce on that ground, not being the type of fraudulent contract which the statute was intended to cover. There is nothing inherently wrong in a second marriage; and unless there is some reason why it should affect the status assumed, the divorce should not be granted.

The fact that a woman represents herself as chaste and virtuous, and as never having been married but once, from which marriage she had been granted a legal separation, when in fact she had been twice married, been divorced by her first husband upon the ground of her own adultery, and divorced by her second husband upon a decree in his favor, is not sufficient fraud upon which to base a decree for a divorce. Joy v. Joy, 12 D. 574.

The fraud in order to be a ground for divorce, must not be merely fraudulent representations which are inducements for entering into the relation, but fraudulent representations as to matters that are essential parts of the relation itself. Meyer v. Meyer 4 B. 368.

(12)

Who may contract matrimony under the laws of Ohio?

Male persons of the age of 18 years, and female persons of age of 16 years, not nearer of kin than second cousins, and not having a husband or wife living, may be joined in marriage. Any such person under the age of 21 years must first obtain the consent of his or her parents, surviving parent or guardian. 110 O. L. 126, Amending G. C. § 11181.

(13)

A and B agree in writing to marry. As an inducement to get B to marry him A gives B a deed to a tract of land. B in good faith accepts the land. A dies before the marriage is consummated.

Can B hold the land against the creditors of A? Give reason for answer.

B can hold the land against the creditors of A. A promise to marry is a valuable consideration to support a contract when the transaction is bona fide. The impossibility of performance is immaterial, since the consideration was the promise to marry. B never breached this contract and should therefore be permitted to retain the consideration. It is said in Groves et al v. Groves 65 O. S. 442 at p. 447, that marriage to be thereafter consummated, is a valuable consideration.

A conveyance for the consideration of marriage stands upon a different basis from a vountary conveyance, and such a consideration is deemed in law a valuable consideration. Where a man conveys a portion of his property to his intended wife, if this is no more than a suitable provision for her, the conveyance will be upheld as against existing and subsequent creditors, where no fraud is exercised by the parties to the settlement, and the presumption, until some evidence of fraud is shown, is that the conveyance is valid, and not a fraud upon the rights of anyone. Elliott on Contracts, Vol. IV § 3850.

(14)

Edna Jones requests you to draw a petition against William Jones her husband for divorce and alimony in the common pleas court of Franklin County, Ohio. The parties were married January 15, 1913, at Columbus, Ohio. They have two children, Lucille and Agnes, 5 and 8 years respectively. Ground for divorce, gross neglect of duty and extreme cruelty. The husband owns a dwelling on Whittier street, Columbus, Ohio, and the parties have joint ownership in the household goods.

Ask for a restraining order forbidding the husband to come on the premises and such other relief as is desired. (Applicant give facts showing ground for divorce).

Draw form for petition. Omit caption and verification.

Plaintiff, Edna Jones, has been a resident of the state of Ohio for the year last past, and has been a bona fide resident in the county of Franklin for thirty days preceding the filing of the petition (or show in county where cause of action arose, G. C. § 11980).

On or about the 15th day of January, 1913, at Columbus, Ohio, she was married to the defendant, William Jones.

The following children were born of such marriage, Lucille and Agnes, aged 5 and 8 years respectively.

1. Defendant was on the 4th day of December, 1924, guilty of extreme cruelty towards the plaintiff in this that he struck her on the head while in a violent temper and did seriously injure her (or state facts constituting extreme cruelty.)

2. Defendant for more than three years last past, has failed and wilfully neglected to provide plaintiff with the common necessaries of life, so that plaintiff has been compelled to live upon the charity of friends and her own exertions, because of his idleness, profligacy, and dissipation (or, having the ability to do so being possessed of property of the value of $..... and being in the constant receipt of wages of $.....

The defendant is possessed of the following property—one dwelling house on Whittier Street, Columbus, Ohio, and an undivided one-half interest in the household goods.

Wherefore the plaintiff prays that she may be divorced from the defendant, and that she may be given reasonable alimony, the custody of said children, and injunction restraining the defendant from coming on the premises.

A. B. and C. D. attorneys for plaintiff

Verification is not necessary in divorce and alimony cases. G. C. § 12003.

(15)

A secures a judgment for permanent alimony against her husband B:

(a) Does the judgment become dormant for want of execution within five years?

(b) Is the judgment affected by proceedings in bankruptcy by the husband?

(c) Will an injunction lie to prevent its enforcement?

(d) Can the unpaid alimony be collected by the administrator of the deceased wife?

(e) Is the decree for alimony when made a lien on real estate, barred by the statute of limitations?

(a) No.

The judgment does not become dormant. A decree for alimony is not a judgment within meaning of Section 11663 which provides that a judgment on which execution has not issued for five years shall become dormant and shall cease to operate as a lien on real estate, nor is it a judgment or finding within meaning of sections 11645 and 11646 which provides for the revivor of a dormant judgment, or a finding for money in any equitable proceeding. Lemert v. Lemert et al, 72 O. S. 364, 74 N. E. 194.

(b) No. A discharge in bankruptcy does not discharge him from paying. A money decree for alimony,

rendered in a proceeding for divorce and alimony, is not a provable claim under the bankruptcy statute of the United States of July 1, 1898. Lemert v. Lemert, 72 O. S. 364, 74 N. E. 194.

(c) No. A judgment or lien for alimony is a continuing and subsisting claim against the husband; it does not become dormant, is not affected by proceedings in bankruptcy, and injunction will not lie to prevent its enforcement. Lemert v. Lemert, 2 C. C. (N. S.) 233, 15 C. D. 253.

(d) Yes. After the wife's death, her unpaid judgment for alimony may be enforced and collected by her administrator although her second husband, as her sole heir, will receive it. Sharp v. Sharp, 7 N. P. 538, 5 D. 562.

(e) No.

Such decree will not be barred by the statute of limitations where no execution was issued on land for more than five years after the date of the decree. Such a decree is not a judgment as provided by statute, which states that judgments will cease to be a lien if not executed within five years. It is of a continuing nature and A can recover such amount from the purchaser of such land. Peeke v. Fitzpatrick, 74 O. S. 396, 78 N. E. 519, app. and fol. Lemert v. Lemert 72 O. S. 364, 74 N. E. 194.

(16)

Give two instances wherein a female who was never married may have exemption set off in lieu of homestead.

When a resident of Ohio marries a woman having a minor child by another marriage living with her, what obligation to the child are assumed by the stepfather?

When she has in good faith the care, maintainance and custody of (1) a minor child or (2) children of a deceased relative.

Husband and wife living together, a widower living with an unmarried daughter or minor son, every widow, and every unmarried female having in good faith the care, maintenance and custody of a minor child or children of a deceased relative, resident of this state, and not the owner of a homestead, in lieu thereof, may hold exempt from levy and sale, real or personal property to be selected by such person, his agent or attorney before sale, not exceeding $500 in value, in addition to the amount of chattel property, otherwise by law exempted. G. C. § 11738.

(b) None. A stepfather is not obliged to support his stepchildren and has no right to their services. His duty is only a moral obligation. Bloomfield Twp. v. Chagrin Twp. 5 O. 315, 317.

(17)

For which of the following causes may a court allow alimony:

(a) That either party had a husband or wife living at the time of the marriage from which the divorce is sought?
(b) Adultery?
(c) Impotency?
(d) Imprisonment in the penitentiary?
(e) Fraudulent contract?

(a) No.
(b) Yes.
(c) No.
(d) Yes.
(e) No.

When the wife files her petition for divorce or alimony, the husband may file a cross-petition for divorce, upon either cause herein—before mentioned. The wife may file her petition for alimony alone, or, if a petition for divorce has been filed by the husband, she may file a cross-petition for alimony, with or without a prayer for the dissolution of the marriage contract. Such petition or cross petition for alimony may be for the following causes:

1. Adultery;
2. Any gross neglect of duty;
3. Abandonment of the wife without good cause;
4. That there is a separation in consequence of ill treatment on the part of the husband, whether the wife is maintained by the husband or not;
5. Habitual drunkenness;
6. Sentence to and imprisonment in a penitentiary, in which case the application must be made while the husband is so confined.G. C. § 11997.

(18)

Smith, age 17, purchased an automobile from the Blank Company; a corporation, and paid $500 down and agreed to pay $100 per month for six months, and executed a note and chattel mortgage to the Blank Company and took possession of the automobile. A few days thereafter, Smith, while operating it at a high rate of speed crashed into a pole and demolished the automobile. He notified the Blank Company to come and get the automobile, and demanded a return of the $500, which was refused. The Blank Company took the car and sold it for $75 to a junk dealer.

Smith, through his father, sued the Blank Company, to recover the $500.

Who should prevail? State reasons. BE BRIEF.

Smith should prevail.

Contracts by minors are voidable, and may be disaffirmed by the minor at any time up to and before the time of reaching majority. Foredyce v. Easthope 8 N. P. 585, 10 D. 610.

On disaffirming and seeking recovery of what he had parted with, he need not restore the consideration, if he has lost, or squandered it; for otherwise, his privilege would not be a benefit, but if in possession, or control, he must restore; for otherwise, the privilege would be a sword and not a shield. Lemmon v. Beeman 45 O. S. 505, 15 N. E. 476.

An infant having purchased an automobile, upon disaffirmance of the contract and tender back of the machine, has the right to recover the amount of the consideration paid by him without diminution either for the use of the machine during the time it was in his possession or for damage accruing for his negligent handling of the machine in the absence of wilful injury. Baker v. Burke Company; 31 D. 77.

It is true that the infant would be responsible for any actual wilful tort. But if the injury complained of arose from a breach of the contract, the infant could not be charged with his breach, by a change in the form of action.

A cause of action in a contract cannot be changed to a tort in order to deprive the benefit of the plea of infancy, but if the injury is not a mere breach of the contract but a distinct wilful and positive wrong of itself, then altho it may be connected with the contract, the infant is liable. Idem. at p. 80.

(19)

Mary Smith at the age of ten was taken from an orphan asylum by Mr. and Mrs. Jones, neither of whom were related to her. Mary Smith was taken to the Jones home and did work about the house and assumed a place in the household similar to the Jones' children. At the age of fifteen, Mary Smith was promised $500 and her support by Mr. and Mrs. Jones if she would stay with them until she was twenty-one years of age. This she agreed to do. On her twenty-first birthday Mary Smith left the Jones home and demanded the $500, which was refused. Mary Smith sues Mr. and Mrs. Jones for $500.

Who should prevail? State reason. BE BRIEF.

Mary Smith cannot recover on the contract because of G. C. § 8621 which provides that "No action shall be brought to charge a person upon an agreement which is not to be performed within one year from the making thereof; unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged therewith, or some other person thereunto by him or her lawfully authorized."

However, Mary is not without remedy since she can recover in quasi-contract for the value of her services. Had she been a member of the family, it would have been presumed that such service was gratuitous. See Walker's American Law, p. 286 under note (a).

But the fact that Mary was not even a member of the family causes no such presumption to be indulged. 1 App. 317.

It is said in Evers v. Gardner, Executor, relationship to a family is established without formal adoption by one who becomes a member of the family in childhood and so continued for many years after reaching maturity, and an action for services will not lie where brought by such a member of the family against the estate of the mother of the family where no agreement was made either by parol or in writing that the services should be paid for. 1 App. 317.

Here there was a parol agreement, however, and she can recover.

(20)

What allegations of plaintiff's petition must be proven on an application for alimony pendente lite?

None.

On application for alimony pendente lite in a suit for divorce and alimony, the court may make an allowance to the wife for her sustenance and expenses during the suit, without requiring proof on her part of the truth of the allegations of her petition, charging aggressions of her husband, which constitute the grounds for such divorce and alimony.

The court may make an allowance of alimony pendente lite to the wife on a proper application therefore and notice, where her petition states a cause of action for divorce and alimony, if the court is satisfied that the action is being prosecuted in good faith, that the husband is able to pay such allowance, and that the wife has no means of her own to pay for sustenance and expenses. 15 C. C. (N. S.) 161, 23 C. D. 592. Adkins v. Adkins. Also Thomas v. Thomas, 18 C. C. (N. S.) 368, 33 C. D. 99, Myers v. Myers, 22 C. C. (N. S.) 218, 33 C. D. 529.

(21)

A owned a residence and his wife B owned a residence of equal value. They had no other property, except each owned some household goods. B sued A for divorce and alimony. It was a close case. The court granted a divorce to B, but no alimony. She had never applied for or received any temporary alimony. The court ordered the property of each party restored free of any claim by way of dower or otherwise of the other party. Is there any error in this judgment? Explain.

Yes.

Barring dower is not within the discretion of the trial judge. Indeed, that matter is not subject to the orders of a court in a divorce proceeding. Dower is a creature of the

statute and is regulated and controlled by statute; it is provided that if the divorce is granted for the aggression of the husband, and the wife survive her husband, she "shall be entitled to her right of dower in his real estate not allowed to her as alimony, of which he was seized during the coverture, and in which she had not relinquished her right of dower." Kundert v. Kundert, 24 App. 342, 346, 156 N.E. 237; see also, G.C.§§ 11990, 11991.

It is not within the power of a court in a divorce proceeding to deprive the wife of her dower without her consent, where the divorce is granted to her for the aggression of her husband. De Witt v. De Witt, 67 O.S. 340, 66 N.E. 136; cited in above case at page 346.

(22)

Is there any presumption as to the legitimacy of a child born during wedlock? Is the rule any different where the question involved is one of inheritance, than where the issue is the support of the child?

Yes.

In Best on Presumptions, in discussing presumptions of legitimacy, the author says: "One of the strongest illustrations of this principle (although resting in some degree on public policy) is the presumption in favor of the legitimacy of children" * * * Thus it is said to be a presumption, juris et de jure, that a child born during wedlock, and of which the mother was visibly pregnant at the time of marriage, must be taken to be the offspring of the husband. § 58, Miller v. Anderson, 43 O.S. 473, 476; Harris v. Seabury, 30 App. 1.

The rule is different where inheritance is involved. We do not affirm that this rule holds good on questions of heirship. There the rights of others are involved outside of the husband and the alleged bastard child. Supra, page 480.

(23)

Jones married Mary Smith in 1925 without her parent's consent, both of them being nineteen years of age. In 1926 he married Margaret Brown and was indicted and convicted of bigamy. Should the conviction be sustained? Why?

Yes.

The Ohio Legislature has fixed the age at which a female person is capable of contracting marriage at sixteen years, and if co-habitation occurs after she has reached that age, the marriage is valid, notwithstanding the consent of her parents to such marriage had not been obtained. Allen v. Allen, 21 L.R. 313, 314; affirming Holtz v. Dick, 42 O.S. 23.

(24)

Bill and Mary were modern youth and as soon as they were married they drew up a little written memorandum

in which they agreed to waive all rights of dower, homestead, etc., in the property of the other. They did not get along at first and Mary consulted a lawyer about a divorce. But they became reconciled and the lawyer sued B for Mary's fee. (a) Can he recover? Why? (b) There were no children. Mary died ten years later. Bill then sought dower in Mary's property. Can he recover? Why?

(a) No.

Where a wife engages a lawyer to prosecute a divorce against her husband, the law will not imply an undertaking by the husband to pay the fees. Dorsey v. Goodenow, W. 120, approved in Karch & Quasser v. Bacciocco, 7 C.C.(N.S.) 190.

Where service is rendered for the wife, against the will of the husband, the fact of service does not afford a legal consideration for an implied assumpsit to pay. Where necessaries are furnished for the subsistence of the wife, the credit is given to the husband. If given to the wife, the husband is not chargeable. Supra, page 120.

(b) Yes.

A husband and wife living together cannot alter their legal relations by a post-nuptial agreement contracting away the dower rights and distributive share provided for each of them under the law. DuBois v. Coen, 100 O.S. 17, 125 N.E. 121; approved in 113 O.S. 228, 230, 148 N.E. 585.

A husband and wife cannot by any contract with each other alter their legal relations, except that they may agree to an immediate separation, and make provisions for the support of either of them and their children during separation. G.C.§ 8000.

For a case holding a separation agreement valid and barring wife from dower, see Hoaglund v. Hoaglund, 113 O.S. 228, 148 N.E. 585.

(25)

Husband and wife were living apart. By agreement they transferred the care and custody of their two children to the husband's father, who accepted the responsibility. The wife repented later and secretly got the children away. The grandfather sues her for damages for loss of their services. Can he recover? Why?

Yes.

The grandfather, in loco parentis, in asserting his custody to the infants, against one who has unlawfully taken them from his possession, can recover, as compensatory damages, the expenses necessarily incurred by him in reclaiming, and in nursing them through any sickness occasioned by the wrongful act of defendant. Clark v. Bayer, 32 O.S. 299, 312.

(26)

A young millionaire, at nineteen, agreed to marry an estimable young lady, but backed out at the last moment. She sued for breach of promise. Has he any valid defense? Why?

Yes.

A contract to marry, made by an infant, stands upon the same footing as respects his right to repudiate it, as any other executory contract that may be avoided by him. The case comes within the general rule, that the contract of an infant is voidable at his election. The fact that under the statute (67 O.L. 6) (now G.C.§ 11181) an infant may be joined in marriage at the age of eighteen, if a male, and sixteen, if a female, having first obtained the assent of the father, or, in case of his death or incapacity, of the mother or guardian, does not affect the right to refuse to perform the contract.

The right to avoid or disaffirm the contract of an infant grows out of his supposed incapacity to protect himself from improvident bargains and relations. And there can be no case where the right to avoid or disaffirm is of more vital concern to his future welfare than where he has made an improvident marriage engagement. The infant's right to avoid such engagement or contract is affirmed by many authorities. Rush v. Wick, 31 O.S. 521.

(27)

Mrs. A sues her husband for divorce and obtains a decree giving her custody of their minor children. She neither asks for nor receives alimony in her divorce suit. Subsequently she enters suit against her husband for support for their children.

Who prevails? Give brief reasons for answer.

Mrs. A.

The obligation of a man to care for his children during their minority is not extinguished by the granting of a decree for divorce to the wife. Cordes v. Cordes, 8 D. 670, 37 B. 225.

The obligation of the father to provide reasonably for the support of his minor child, until the latter is in a condition to provide for his own support, is not impaired by a decree which divorces the wife a vinculo, on account of the husband's misconduct, gives to her the custody, care and nurture of the child, and allows her a sum of money as alimony, but with no provision for the child's support. The mother may recover a reasonable compensation from the father, for necessaries furnished by her to the child after the decree, and may maintain an original action for such compensation against the father, in a court other than that

in which the divorce was granted. Pretzinger v. Pretzinger, 45 O.S. 452; approved in Hackenberg v. Hackenberg, 17 C.C.(N.S.) 456, 457; and Straub v. Straub, 28 L.R. 317.

(28)

A, who is financially able to support his aged father who is penniless, refuses to do so:

(a) Can a civil action be maintained against him to enforce such support?

(b) Can criminal proceeding be instituted against him?

(a) No.

There is no civil liability under the law of Ohio for failure to support a parent, who by reason of old age, infirmity or illness is unable to support himself; and a civil action brought under § 7017-3, (now G.C.§§ 12429, 12430, 12431), relating to the abandonment of a destitute, aged or infirm parent, will not lie. Parker v. Swarts, 4 L.R. 23, 51 B. 124.

(b) Yes.

Whoever, being an adult resident of the state and possessed of or able to earn means sufficient to provide food, shelter, care and clothing for his or her parent, within this state, who is destitute of means of subsistence and unable either by reason of old age, infirmity or illness to support himself, neglects or refuses to supply such parent with necessary shelter, food, care and clothing shall be fined * * *. G.C.§ 12429.

(29)

A abandons his minor child, and B furnishes A's child with food, clothing and shelter.

Can B recover against A, in an action in which he seeks reasonable compensation for his support of the child? Give brief reasons for answer.

Yes.

The husband must support himself, his wife, and his minor children out of his property or by his labor * * *. G.C.§ 7997, see Murphy v. Quigley, 21 C.C. 313, 318, 11 C.D. 639; Thiessen v. Moore, 105 O.S. 401, 421.

(30)

A wife living separate and apart from her husband, in a suit against him for divorce and alimony, obtained a decree for alimony pendente lite in the sum of $300, which sum was promptly paid by the husband. B, a merchant, during the pendency of said suit, and after the allowance and payment of said alimony, but without notice of the allowance and payment thereof, furnished necessaries to the wife to the amount of $100. Can B recover from the husband the value of the necessaries so furnished? Why?

No.

The plaintiff says, first, that he had no knowledge of the allotment and payment of the alimony. The answer to this is, that he should have inquired. He was dealing with a married woman living separate from her husband, and the authorities are abundant that he could do so only at his own peril. The presumption of law, in such case, is that the husband is not liable, and the circumstances fixing his liability must be shown by the party seeking to charge him. If he took the risk of so doing, without inquiry, he has only himself to blame. Hare v. Gibson, 32 O.S. 33, 37, 38; app. in 21 D. 727.

(31)

B adopts C. B dies and afterwards A, B's father, dies intestate, leaving property. Would the adopted child inherit from the ancestor of the adopted parent under our statutes of descent?

No.

An adopted child is enabled by R.S.§ 3140 (now G.C. § 8030) to inherit from its adopter, but not through him, from his ancestors. Phillips v. McConica, 59 O.S. 1, 51 N.E. 445; Pickering v. Koesling, 26 L.R. 18.

R.S.§§ 3139, 3140 (G.C.§§ 8029, 8030) did not give to an adopted child the same rights of inheritance to real estate or to distribution of personal estate in the property of an ancestor of the adopting parent as if he had been born to the adopting parents in lawful wedlock.

This was the specific holding in Phillips v. McConica, 59 O.S. 1, which held in paragraph 4 of the syllabus that an adopted child is enabled, by R.S.§ 3140 to inherit from its adopter, but not, through him, from his ancestors. This decision is still law in this state. Albright v. Albright, 116 O.S. 668, 677, 157 N.E. 760.

(32)

B, a minor, buys a horse from D and to secure the purchase money executes a chattel mortgage thereon to the vendor. Upon arriving at full age, B sells the horse to C, an innocent purchaser, for value. The mortgage becomes due and D brings a replevin suit to recover the horse. C defends, claiming that B had disaffirmed the contract on account of his minority when he sold to C. Who is entitled to judgment? And why?

D, the vendor.

The privilege of infancy may be used as a shield, but not as a sword. And in such case, if the infant sells the mortgaged property, the purchaser takes it subject to the mortgage. Curtiss v. McDougal, 26 O.S. 66, 75.

(33)

An officer, before whom a marriage ceremony was performed, was not authorized to perform such ceremony. The parties lived together as man and wife for years. Are the children of such parties legitimate and is the wife entitled to dower upon the death of the supposed husband?

Yes, as to both questions.

G.C.§ 8591 provides:

*** * * The issue of parents whose marriage is null in law, shall nevertheless be legitimate.**

Misgiving on the part of a common-law wife and some of her neighbors as to the legality of her marriage is without significance, where it appears that she and her reputed husband entered into a solemn contract, in the presence of a witness, to henceforth live together as man and wife, and this agreement was carried out, and a child was born to them, and they continued to live together, with short interruptions, and to hold themselves out as man and wife until the death of the husband; and in such case the court will decree that the woman has a dower interest in the estate of the decedent. Walker v. Walker, 15 N.P.(N.S.) 189.

(34)

A buys land and gives back a mortgage for the purchase money. A's wife does not sign the mortgage. Has she a dower right in the land, and if so, is such dower right superior to the mortgage?

She has a dower right in the land, but only of the surplus remaining after the payment of the purchase money mortgage.

A widow is dowable of the surplus remaining after the payment of a purchase-money mortgage. Fox v. Pratt, 27 O.S. 512; approved in Nichols v. French, 83 O.S. 162, 166.

(35)

A wife brought an action in the court of common pleas against her husband to recover damages for injuries she claims to have sustained while riding in an automobile owned and operated by the husband.. She avers that her injuries were caused by the negligence of her husband in operating the automobile.

(a) Could such an action be maintained at common law?

(b) Could such an action be maintained under the statutes of Ohio?

(a) No.

(b) No.

At common law neither the husband nor wife could maintain an action in tort against the other. 30 C.J., p. 714,

§ 317; cited in Leonardi v. Leonardi, 21 App. 110, 153 N.E. 93.

The common-law principle of non-liability for a tort committed by either husband or wife upon the other was not on the ground that the antenuptial property of the wife at marriage was acquired by the husband, but because the husband and wife were at common-law one person. The legal existence of the wife was merged in that of the husband. 13 R.C.L. 1394, § 443, cited on pages 112, 113.

None of the sections of the General Code from §§ 7995 to 8004 clearly express the intention on the part of the legislature to abrogate the common-law principle that a married woman cannot maintain an action against her husband for a personal injury caused by his neglect; nor does G.C.§ 11245 so do. Until the legislature does so express its intention, the wife cannot maintain such an action against her husband to recover damages for a personal injury caused by his negligent act. Supra, p. 117.

(36)

(a) What are the grounds on which alimony will be allowed?

(b) To what extent does the remarriage of a woman affect alimony formerly granted to her?

(a) 1. Adultery;

2. Any gross neglect of duty;

3. Abandonment of the wife without good cause;

4. That there is a separation in consequence of ill treatment on the part of the husband, whether the wife is maintained by the husband or not;

5. Habitual drunkenness;

6. Sentence to and imprisonment in a penitentiary, in which case the application must be made while the husband is so confined. G.C.§ 11997.

(b) A decree for alimony is not affected by the subsequent marriage of the woman to whom it is granted, in the absence of a provision in the decree that it shall have such effect, although such marriage may, in some cases afford sufficient ground for reducing the amount. King v. King, 38 O.S. 370, 372; Olney v. Watts, 43 O.S. 499, 507.

The decisions of many inferior courts establish the fact that remarriage is a strong argument in favor of modification of a decree for alimony payable in installments. "Alimony is an allowance to a wife from the estate of her husband for her support, and upon remarriage its payment becomes inconsistent with accepted ideas regarding the institution of marriage." Baker v. Baker, 4 App. 170.

(37)

Roy Smith, an infant seven years of age, made his home with the Brown family, who legally adopted him in probate court of the county in which they resided. Roy Smith was

killed in a railroad accident, and his natural father, James Smith, and the adopted father, Frank Brown, each filed suit for damages for the wrongful death.

Who is entitled to recover?

The adopted father, Frank Brown.

Under the federal statute for the recovery of damages for wrongful death by personal representatives, and also the Ohio General Code (G.C.§ 10772) to the same effect, the words "parents" and "children" are used without limit or qualification, and include adopting parents and adopted children as well as natural parents and natural children. Ransom v. The N. Y. C. & St. L. Ry., 93 O.S. 223, 112 N.E. 586.

G.C.§ 8030 provides that upon adoption, the natural parents are divested of all rights with respect to the child and said child becomes as truly the child of the adopting parents as though begotten in lawful wedlock.

(38)

M, an unmarried man, had a child by R, a married woman. R later became divorced from her husband and intermarried with M, who acknowledged such child.

Is such child now legitimate, so that it may be an heir?

Yes.

When, by a woman a man has one or more children, and afterward intermarries with her, such issue, if acknowledged by him as his child or children, will be legitimate * * *. G.C.§ 8591.

M, an unmarried man, had a child by R, a married woman; R, afterwards became divorced from her husband, and thereafter M intermarried with her and acknowledged the child as his child. It was held that the child was thereby legitimated, and upon the death of M, the child had all the rights of an heir of his body. Ives v. McNicoll, 59 O.S. 402 [affirming Ives v. McNicoll, 12 C.C. 297, 5 C.D. 555; and McNicoll v. Ives, 3 N.P. 6, 4 D. 75]; Kniffen v. Schaffer, 12 C.C. 753, 4 C.D. 62.

(39)

Is a married woman, living apart from her husband, entitled to exemptions?

Yes.

The rule established in Kimmel v. Paronto, 52 O.S. 468, that under R.S.§ 5319, (now G.C.§ 11591), a married woman is entitled to the benefit of all exemptions allowed by law to the heads of families, though she be living apart from her husband, and have no child or children living with, or supported by her, is not confined to a case where the demand is for an allowance of wearing apparel and household goods in lieu of homestead, but applies also to a case where the demand is for an allowance of money in lieu of a homestead. Shaw v. Foley, 62 O.S. 30.

Equity

(Numbers in parenthesis refer to answers following.)

I. JURISDICTION, PRINCIPLES, MAXIMS. (1b, 2b, 5, 6, 7, 9, 13, 16, 19, 23, 25, 26, 32)

Equity, 3 to 37.

See Ans. 1, Memory Work; G.C.§§ 11590, 11788, 11899, 11900; 24 O.S. 474; 25 O.S. 516; 52 O.S. 499; 111 O.S. 633; 21 App. 244; 17 N.P.(N.S.) 74; 25 N.P.(N.S.) 574.

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Definitions

EQUITY.—Equity is that system of justice which was administered by the High Court of Chancery in England in the exercise of its extraordinary jurisdiction. This definition is rather suggestive than precise; and invites inquiry rather than answers it. But this must necessarily be so. Equity, in its technical and scientific legal sense, means neither natural justice nor even all that portion of natural justice which is susceptible of being judicially enforced. It has, when employed in the language of English law, a precise, definite and limited signification, and is used to denote a system of justice which was administered in a particular court—the nature and extent of which system cannot be defined in a single sentence, but can be understood and explained only by studying the history of that court, and the principles upon which it acts. Bispham's Equity, 10th Ed., pp. 1 and 2.

TRUST.—A right of property, real or personal, held by one party for the benefit of another. In its technical sense, is the right, enforceable solely in equity, to the beneficial enjoyment of property of which the legal title is in another. Bouvier's Law Dictionary, Baldwin's Revision.

LACHES.—Unreasonable delay; neglect to do a thing or to seek to enforce a right at a proper time. The question of laches depends not upon the fact that a certain definite time has elapsed since the cause of action accrued, but upon whether, under all the circumstances, the plaintiff is chargeable with want of due diligence in not instituting the proceedings sooner; it is not measured by the statute of limitations; but depends upon the circumstances of the particular case. Bouvier's Law Dictionary, Baldwin's Revision.

CY PRES.—The rule of construction applied to a will (but not to a deed) by which, where the testator evinces a general intention to be carried into effect in a particular mode which cannot be followed, the words shall be so construed as to give effect to the general intention. Bouvier's Law Dictionary, Baldwin's Revision.

CHARITABLE BEQUESTS.—If a testator dies leaving issue of his body, or an adopted child, living, or the legal representative of either, and the will of such testator, gives, devises or bequeaths the estate of such testator, or any part thereof, to a benevolent, religious, educational, or charitable purpose, or to this state or to any other state or country, or to a county, city, village, or other corporation, or asscia-tion in this or any other state or country, or to a person in trust for such purposes, or municipalities, corporations, or associations, whether such trust appears on the face of the instrument making such gift, devise, or bequest or not; such will as to such gift, devise, or bequest, shall be invalid unless it was executed according to law, at least one year prior to the death of the testator. Throckmorton's General Code of Ohio, § 10504.

LIS PENDENS.—The doctrine of lis pendens, as usually understood, is the control which a court has over the property involved in a suit, during the continuance of the proceedings, and until its final judgment

has been rendered therein. Bouvier's Law Dictionary, Baldwin's Revision.

When the summons has been served or the publication made, the action is pending so as to charge third persons with notice of its pendency. While pending, no interest can be acquired by third persons in the subject of the action, as against the plaintiff's title. Throckmorton's General Code of Ohio, § 11300.

MANDATORY INJUNCTIONS.—Mandatory injunctions command the defendant to do a particular thing. Bouvier's Law Dictionary, Baldwin's Revision.

INTERLOCUTORY INJUNCTIONS.—Preliminary or interlocutory injunctions are used to restrain the party enjoined from doing or continuing to do the wrong complained of, either temporarily or during the continuance of the suit or proceeding in equity in which such injunction is granted, and before the rights of the parties have been definitely settled by the decision and decree of the court in such suit or proceedings. Bouvier's Law Dictionary, Baldwin's Revision.

OHIO STATE BAR EXAMINATIONS

QUESTIONS WITH ANSWERS

[*Arranged Chronologically.*]

(1)

(a) What change, if any, was made by the constitutional amendments of 1912, relative to the jurisdiction of the Court of Appeals in the matter of appeal of actions?

(b) Is the matter of the jurisdiction of such court controlled by the General Assembly or by the Constitution?

(a) Article IV Section 6 of the Ohio Constitution provided that "the circuit court shall have such appellate jurisdiction as may be provided by law," until it was amended on September 3, 1912, to read "the courts of appeals (the old circuit courts) shall have appellate jurisdiction in the trial of chancery cases."

The Constitution confines the appellate jurisdiction of the court of appeals to chancery cases. In re Hawke 107 O. S. 341, 140 N. E. 583.

(b) By the Constitution.

Article IV, Section 6 of the Ohio Constitution provides what the jurisdiction of the courts of appeals shall be and specifically sets out their jurisdiction, so that on the principle that the legislature of Ohio has only jurisdiction in cases not reserved in the Ohio Constitution, the legislature has no authority to govern the courts of appeal.

"The jurisdiction of the court of appeals is granted by the Constitution, and the legislature can not change it but may provide the methods of exercising it. Statutes existing as to the method of exercising such jurisdiction are saved by

the Schedule of the Constitution." Craig v. Welpy, 104 O. S. 312, 136 N. E. 143.

It is well settled by the decisions of this court that the general assembly has no power to enlarge or limit the jurisdiction conferred by the constitution, but may provide by law the method of exercising that jurisdiction. idem at p. 314, citing, Cincinnati Polyclinic v. Balch, 92 O. S. 415, 111 N. E. 159; Wagner v. Armstrong, 93 O. S. 443, 113 N. E. 397; Barnes v. Christy, 102 O. S. 160, 131 N. E. 352; Russell admr. v. Fourth Nat'l. Bank, 102 O. S. 248, 131 N. E. 726.

(2)

(a) K, a ball-player agreed to contract to render professional services to the Chicago Base Ball Club. The owners of the Cleveland Club, knowing this fact, nevertheless induced him to sign a contract to play with that organization. The player afterwards repudiated his contract with the Cleveland Club, and then enters into the original contract. Can the Cleveland Club enjoin the performance of the services with the Chicago Club?

(b) What maxim of equity is applicable to this state of facts?

(a) No.

In "Weeghan vs. Killefer et al" 215 Federal 168, the complainants sought an injunction to restrain the defendant from playing baseball with any other club than their own. It was found by the court that he was a player of unique, exceptional and extraordinary skill. But complainants, knowing that he had entered into an unenforceable agreement to play as a member of another club, had induced him by the offer of a larger salary to break his agreement and play with their own club. Then he was induced to repudiate the agreement with the complainants and to enter into a new agreement to play with the club with which he had originally contracted. An injunction was sought by complainants to restrain him from doing so. This was refused on the ground that complainant's conduct in inducing him to break his unenforceable agreement was such misconduct in regard to the matter in litigation as honest and fair-minded men would condemn and pronounce wrongful, and, although insufficient to constitute the basis of legal action, was quite sufficient to bar relief in equity. The complainant's hands were not clean. The case was appealed to the Circuit Court of Appeals for the sixth circuit and was affirmed, 215 Federal 289, L. R. A. 1915A, 820.

(b) The equitable maxim which applies is, "He who comes into equity, must come with clean hands."

(3)

Write fifty words on subject of Equitable Estoppel. Give an illustration.

Equitable estoppel or estoppel in pais is such as arises from the acts and declarations of a person by which he designedly induces another to alter his position injuriously to himself. Ensel v. Levy, 46 O. S. 255, 19 N. E. 597.

Equitable estoppel or estoppel by conduct, is said to have its foundation in fraud, considered in its most general sense. Bispham on Equity § 282.

It is said that the following elements must be present in order to justify an estoppel by conduct: 1. There must have been a representation or concealment of material facts; 2. The representation must have been made with knowledge of the facts; 3. The party to whom it was made must have been ignorant of the truth of the matter; 4. It must have been made with the intention that the other party would act on it; 5. The other party must have been induced to act on it. Bigelow on Estoppel, 437.

An estoppel in pais arises where one is prejudiced by the wilful act or declaration of another upon whose conduct the former has rightfully acted. Hence, where the owner of goods sells to one on credit, and knowingly delivers to him a receipt drawn in such form, and given under such circumstances as to cause an innocent purchaser, buying from the vendee, rightfully to believe that the goods will be delivered upon compliance by said purchaser with certain conditions in the receipt contained, and he parts with his money in good faith upon the belief thus created, such purchaser has the right to avail himself of the terms of the contract and the vendor is afterwards estopped to set up a lien for purchase money and insist upon its payment as further condition to delivery of the goods. Ensel v. Levy 46 O. S. 255, 19 N. E. 597.

(4)

Why is it difficult to frame a satisfactory definition of Fraud? Frame one.

Bispham on Equity states that it is difficult to give a satisfactory definition of fraud in a single sentence, for the simple reason that courts of equity have always avoided circumscribing the area of their jurisdiction in such cases by precise boundaries, lest some new artifice, not thought of before, might enable a wrondoer to escape from the power of equitable redress. "The Court," said Lord Chancellor Hardwicke in "Lawley v. Hooper," decided in 1745, "very wisely hath never laid down any general rule beyond which it will not go, lest other means for avoiding the equity of the court, should be found out." Bispham on Equity, § 197.

Eaton says, "To define the equitable conception of fraud is not possible. The fertility of man's invention in devising new schemes of fraud is so great that courts of equity have declined the hopeless attempt of embracing in one formula all its varieties of form and color, reserving to

themselves the liberty to deal with it under whatever form it may present itself.

As has been said: "Fraud is infinite and were courts of equity once to lay down rules as to how far they would go, and no further, in extending their relief against it, or define strictly the species or evidence of it, the jurisdiction would be cramped and perpetually eluded by new schemes which the fertility of man's invention would contrive." Eaton on Equity, § 122.

Fraud is a false representation of fact made with a knowledge of its falsehood, or in reckless disregard whether it be true or false, with the intention that it should be acted on by the complaining party, and actually inducing him to act on it. Anson on Contracts p. 199.

Fraud, in the contemplation of Equity, properly includes all acts, omissions or concealments which involve a breach of equitable duty, trust, or confidence justly reposed and which are injurious to another or by which an undue and unconscientious advantage is taken by another. Eaton on Equity, 2nd Ed. § 122 p. 259.

(5)

Draw a distinction between the following equitable maxims:

"He who seeks equity must do equity."

"He who comes into equity must come with clean hands."

Which of these two is the more comprehensive?

The maxim "He who comes into equity must come with clean hands" is more comprehensive than, "He who seeks equity must do equity." The latter, in the cases to which it applies, defines conditions which should be annexed to a decree granting equitable relief, while that which is here invoked (the former) in the cases to which it applies denies to the plaintiff all equitable relief; but so similar are they and the reasons upon which they stand in all cases to which they apply, that, in some of the earlier cases and commentaries on equity jurisprudence, the entire subject is treated as comprehended within the maxim lastly stated. It is to be observed that the conditions which are annexed to the granting of equitable relief are always founded upon considerations arising out of the subject of the suit and that a plaintiff as a condition to equitable relief, is not required to do equity with respect to matters not involved in the subject of the suit. The maxim "he who comes into equity must come with clean hands" denies all relief to a suitor, however well founded his claim to equitable relief may otherwise be, if, by implication even, to affirm the validity of an unlawful agreement or give its approval to inequitable conduct on his part. Kiner v. L. S. & M. S. Railway Co., 69 O. S. 339, at p. 344, 69 N. E. 614.

In an action in the nature of a creditor's bill, to enforce collection of a judgment for alimony, obtained by the wife against the husband, a court of equity has power before enforcing such judgment to make a conditional decree requiring the wife to make restitution of property obtained in lieu of alimony theretofore agreed upon with her husband, or, if restitution be not made, to enjoin the collection of the judgment for alimony upon the cross-petition of the husband; it being inequitable to permit the wife to enforce the judgment for alimony and at the same time retain the property obtained by the agreement. The maxim, "He who seeks equity must do equity," is held applicable. McEntire v. McEntire et al, 107 O. S. 510, 140 N. E. 328.

(6)

Can a court of equity disregard statutory and constitutional provisions in order to avoid the rendition of a judgment manifestly unconscionable? What is the equitable maxim applicable to such a situation?

No.

"Equity follows the law."

Courts of equity can no more disregard statutory provisions than can courts of law. Hedges v. Dixon 15 (How.) U. S. 182-192.

"Wherever the rights or the situation of the parties are clearly defined and established by law, equity has no power to change or unsettle those rights, or that situation, but in all such instances the maxim that equity follows the law is strictly applicable. Magniac v. Thompson, 15 U. S. 199.

A contract of conditional sale, G. C. § 8568, presupposes that the title to the goods remains in the vendor; and a vendor under such circumstances can have no lien on his *own* property. The conditions attached to such a sale by the statute are as much a part of the contract as if specifically embodied therein, and a court of equity has no power to change such statutory rights but in that respect equity follows the law. Krug, Receiver v. National Cash Register Co., 1 N. P. 429, 3 D. 107.

(7)

If you know, from what was the word "Equity" derived and what did the word mean from which it was derived? If you do not know its derivation, give a short definition of Equity, as a department of our juris-prudence.

The word "equity" is derived from the Latin word "aequitas" meaning equal. Funk and Wagnalls Dictionary.

Equity is defined by Bispham as that system of jurisdiction which was administered by the High Court of Chan-

cery in England, in the exercise of its extraordinary jurisdiction.

Story defines Equity as that system of jurisprudence which affords a remedy where there is no plain, complete, and adequate remedy at common law.

Equity is classified under three general headings, first, where the common law failed to recognize a Title; second, where it failed to recognize a Right; third, where the common law failed to give the proper Remedy.

Hence when you think of Equity, you should also think of the three headings (1) Titles (2) Rights (3) Remedies.

Equity is said to be the spirit of the law; courts of chancery were organized to administer equity in all cases where the law by reason of its universality failed to do justice between the parties. Rote v. Stratton, 2 N. P. 27, 3 D. 156.

(8)

(a) Define Estoppel.
(b) What is subrogation?

(a) Estoppel means the preclusion of a person from asserting a fact, by previous conduct inconsistent therewith, on his own part or that part of those under whom he claims, or by an adjudication upon his rights which he cannot be allowed to call in question.

A preclusion in law, which prevents a man from alleging or denying a fact, in consequence of his own previous act, allegation, or denial of a contrary tenor. Bouvier's Law Dictionary, Baldwin's Revision.

(b) Subrogation means the substitution of another person in the place of the creditor, to whose rights he succeeds in relation to the debt. That change which puts another person in the place of the creditor, and which makes the right, the mortgage, or the security which the creditor has passed to the person who is subrogated to him—that is to say, who enters into his right.

It is the substitution of another person in place of the creditor, so that the person substituted will succeed to all the rights of the creditor, having reference to a debt due him. It is independent of any merely contractual relations between the parties to be affected by it, and is broad enough to cover every instance in which one party is required to pay a debt for which another is primarily answerable, and which in equity and conscience ought to be discharged by the latter. Bouvier's Law Dictionary, Baldwin's Revision.

Subrogation is a doctrine of equity by which one who has been compelled to pay a debt which is the liability of another, is entitled to enforce the security for such debt given to the party to whom he has been compelled to make such payment. Ebright v. Chapman, 11 N. P. (N. S.) 481, 21 D. 96.

The doctrine of subrogation rests generally upon the principle that one who, for the purpose of protecting his own interests in the property, pays the debt or liability of another, is entitled to, and may enforce all the liens and securities of the party to whom he pays. Eddy v. Leath, 6 C. C. (N. S.) 249, 16 C. D. 645, Aff. 74 O. S. 462, 78 N. E. 1124.

(9)

(a) What civil courts in Ohio have full equity jurisdiction?

(b) What civil courts have no equity jurisdiction?

(c) What civil courts have limited equity jurisdiction?

(d) What United States courts situated in Ohio have full equity jurisdiction?

(e) Are there any United States courts in Ohio that have no equity jurisdiction?

(a) Common Pleas Court is the only court which has full original equity jurisdiction, although the court of appeals and the Supreme Court have appellate jurisdiction. Tetterbach v. Mayer, 19 B. 221. See Art. 4, § 6 and 2 of Ohio Constitution.

(b) Municipal Courts have no equity jurisdiction. Wilkinson v. Morgan, 14 L. R. 502.

Also Justice of the Peace Courts have none. Sloane v. Clauss, 64 O. S. 125, 59 N. E. 884; Moore v. Freeman, 50 O. S. 592, 35 N. E. 502.

(c) Probate Courts have limited equity jurisdiction. Healy v. Bank, 12 N. P. (N. S.) 193 at p. 202, 22 D. 502.

It is a mistake to suppose that the probate Court has no equity powers unless expressly conferred. Power to make an order implies power to dispose of all questions necessary to settle before making it. Clapp v. Banking Co., 50 O. S. 529, 35 N. E. 308.

Insolvency Courts have also limited jurisdiction in equitable matters.

The powers of the court of insolvency, legal and equitable, are only such as are conferred upon it by statute, and such as are necessarily incident to the exercise of its statutory powers. This is held to give such court the widest scope in law and equity in determining the validity and priority of liens on property which has come under its jurisdiction. But the court of insolvency or the probate court have never been held to have equitable jurisdiction to set aside a conveyance whereby the assignor has parted with possession and where, by assignment, the possession of the property has not passed to the assignee, and thus come into the jurisdiction of the court. Said courts have never been held to have jurisdiction to try equitable questions between persons, but only in the course of their administration upon the res. Benedict and Miner, trus-

tees v. The Market Nat'l Bank et al, 6 D. 320, 4 N. P. 231.

(d) United States District Courts and United States Circuit Court of Appeals for this district have full equity power by virtue of Sections 1 and 2 of article 3 of the Federal Constitution. See Fitch v. Craighton, 65 U. S. 159, 3 O. F. D. 630.

(e) No.

(10)

G. C. § 11894 provides six grounds for the appointment of a receiver. In the exercise of this power is the court acting as a court of equity or a court of law? And why?

As a court of law.

A proceeding for the appointment of a receiver does not constitute a chancery case within the purview of Section 6, Art. IV, of the Ohio Constitution. Investment Co. v. Haas, 110 O. S. 188 overruling the case of Thompson v. Denton, 95 O. S. 333, 106 N. E. 452.

(11)

A bought by land contract a lot of B, in a new allotment and addition to the city of Columbus. B, in the contract of sale, agreed that by November 1, 1919, he would grade the streets, put in sidewalks, water mains, gas mains, and electric service wires on the streets. He did not do so, because he could not. The city had not extended its mains or wires or fixed the grades for sidewalks or streets. A had paid in $550 and still owed under contract $450.

What was A's remedy, and why?

He can rescind the contract and recover back his money paid on the theory of unjust enrichment or he can sue for the difference between the actual value and what the lot would have been worth, had the improvements been made.

For instance, A contracted to sell a quarter section of land to B, and receives one half the purchase money. B takes possession. The title afterwards fails or A refuses to convey. B may surrender the possession to A, thereby assenting to the recission of the contract, and recover back the money paid in an action for money had and received. Or he may consider the contract as subsisting, and claim damages for its breach. In the latter case, it would not be necessary that he should surrender the possession. Reed v. McGrew, 5 O. 376 at p. 387.

(12)

Jones brought a case against Miller to enjoin Miller from using a trademark and name, and also prayed for $10,000 damages accruing because of past use and pirating such trade mark and trade name. Is, or is not, the claim for damages a jury issue? And why?

No.

Ordinarily, an action to recover money on a tort or for breach of contract, is a jury issue, (G. C. § 11379), but if the plaintiff comes into Equity for an injunction, and Equity once takes hold of the case, it has jurisdiction as to all matters or questions in the case. In Equity, a jury may hear the case, only at the discretion of the court. Oliver v. Pray, 4 O. 175 at p. 195.

An action for an injunction and incidentally for an account is not a jury case. The right of the plaintiff to an account in the action depended on his right to an injunction, and is triable by the court under G. C. § 11380. Chancy Converse et al v. Horace A. Hawkins, 31 O. S. 209. Doctrine approved in Wheeling and Lake Erie R. R. Co. v. Horner, 33 B. 332.

(13)

Name eight equitable remedies.

(1) Specific performance;
(2) Injunction;
(3) Cancellation;
(4) Recission;
(5) Reformation;
(6) Accounting;
(7) Interpleader;
(8) Partition;
(9) Quia timet;
(10) Receivers;
(11) Creditors bills;
(12) Interpleader.

See Turnipseed's "Tabular Analysis of Equity Jurisprudence", especially adapted to Bispham's Principles of Equity.

(14)

A brings suit against her husband B for divorce and alimony. The parties to this action agree on $100 per month alimony to be paid to the wife. Said agreement is approved by the court. The wife is granted a divorce and later she remarries a man of wealth. Is the agreement or decree for alimony subject to modification by reason of the changed conditions of the parties?

Reason for answer.

No. A decree for alimony adopted by the court from an agreement of the parties is not the judgment of the court based upon evidence, and as such may not be modified by the court thereafter, but is final. Sargent v. Sargent, 8 N. P. 238, 11 D. 218 at p. 220. See Connolly v. Connolly, 16 App. 92.

These cases must be distinguished from the line of cases in which the alimony is not based upon the agreement of

the parties. Where not based upon such agreement the rule is as follows:

The court has jurisdiction to modify a decree for alimony subsequent to the term at which it was entered, where the petition for modification is based on a changed condition in the circumstances of the wife, who, subsequent to the entering of the decree, obtained a divorce from the husband in another action and was married to a wealthy man who made ample provision for her support, and the fact that the petition is filed in an original case rather than in a new case with a new number is immaterial. Madden v. Madden, 18 D. 161, 4 L. R. 579; Olney v. Watts, 43 O. S. 499, 3 N. E. 354.

(15)

A brings suit against B on a note and secures judgment for $1000. B admits on the witness stand that he has no real estate, and that all of his personal property has been converted into cash, the amount of the same being $3,000 all of which is in his pocket. What steps can A take to compel B to pay the judgment?

A may apply for an order from the court in aid of execution.

On proof by affidavit of the judgment creditor, the judge of the court of common pleas or probate judge of the county in which the judgment debtor is found, when satisfied that the judgment debtor has property which he unjustly refuses to apply toward the satisfaction of the judgment, such judge may require the debtor to appear to answer concerning it. G. C. § 11769.

The judge may order any property of the judgment debtor or money due to him, not exempt by law, in the hands either of himself or other person to be applied toward the satisfaction of the judgment. G. C. § 11781.

(16)

On May 1, 1924, A sells his dwelling to B by contract in writing and A accepts part of the purchase price and agrees to make a deed to be dated May 15, 1924. The contract was not recorded. A sells the same dwelling to C on May 10, 1924, at a profit of $500 above the contract price to B, and A makes a deed to C forthwith.

Does the maxim apply: "Between equal equities priority of time will prevail?" Give reason for answer.

No. The maxim which applies is, "Between equal equities the law will prevail."

"If two persons have each an equally good equitable right, but one of them has the legal title to the subject of the dispute, equity will not interfere, but leave them to the courts of law, when, of course, the holder of the legal title will prevail. Thus, if a purchaser for a valuable consider-

ation without notice of a prior right, obtains the legal estate at the time of his purchase, he will be entitled to priority in equity as well as in law." Bispham on Equity, 10th Ed. § 40, p.69.

Indeed the maxim goes further, for the bona fide holder of an equity who has acquired it for value without notice of a prior equity may, even after he has received notice of the prior equity, obtain an advantage by getting in any outstanding legal title; and of this advantage a court of chancery will not ordinarily deprive him. Dueber Watch Co. v. Doughterty, 62 O. S. 589, 57 N. E. 455, cited in Bispham, p. 69.

(17)

John Jones gives John Smith his note and mortgage for $1,000 dated September 3, 1923, for six months with interest at eight per cent. Give form for prayer of petition for foreclosure of mortgage; also show that you are asking for personal judgment against John Smith for unpaid balance, if any. Give form of praecipe in the above action in the Franklin County common pleas court.

In this question the examiner mixed the parties names, but it can be seen readily that John Jones is the defendant.

"Wherefore plaintiff prays judgment against defendant, John Jones, in the sum of $1,000 with interest at eight per cent from the third day of September 1923; that said mortgage deed be foreclosed and said premises sold, and the proceeds of said sale be applied toward the payment of the liens on said premises in accordance with their priority, and for such other and further orders and relief as may be just and proper."

.....
Attorney for Plaintiff.

The State of Ohio, Franklin County, ss.

John Smith, being duly sworn says he is the plaintiff in this action, and that the facts stated and allegations contained in the foregoing pleading are, as he believes, true.

John Smith.

Sworn to before me and subscribed in my presence this twelfth day of March, 1924.

(Seal) .....
Notary Public Franklin Co.

Praecipe: To the Clerk of Court:

Issue summons in this action to the Sheriff of Franklin County, Ohio, for the defendant named in the title of this case, returnable according to law. Indorse: "Amount claimed $1,000 with interest from the third day of September, 1923, for which judgment will be taken.

.....
Attorney for Plaintiff.

For these forms see Baldwin's Civil Practice Manual of Ohio, Forms No. 41, 72 and 30.

(18)

Give at least four things that should appear in the absence of statutory ground to justify the appointment of a receiver of the assets of a corporation.

Several things which should appear in the absence of statutory ground to justify the appointment of a receiver are:

(1) That there is no other adequate remedy;

(2) That to refuse appointment would cause complainant irreparable loss;

(3) That the appointment could prevent this loss;

(4) That the plaintiff has some right, claim or interest in the property for which the receiver is asked;

(5) That a receiver is necessary to save it from material injury and affect the purpose of the suit;

(6) That the remedy is not because of past, but present conditions and a well founded apprehension of the future. Beach on Receivers, § 806.

(19)

What is the essential difference between the character of relief given by a court of law, and by a court of equity?

It was against the person that the jurisdiction of the court of equity was originally acquired, and an attachment against the person has always been, and still is, one of the ordinary means of enforcing obedience to its decrees. Indeed, it may be said that, "generally, if not universally, equity jurisdiction is exercised in PERSONAM AND NOT IN REM, and depends upon the control of the court over the parties, by reason of their presence or residence, and not upon the place where the land lies in regard to which relief was sought. Bispham on Equity, § 47, 10th Ed.

Moreover equity acts specifically, and not by way of compensation, which embodies a general principle running through the whole system of chancery jurisprudence. This principle is that equity aims at putting parties exactly in the position which they ought to occupy, giving them in specie what they are entitled to enjoy, and putting a stop, actually to injuries which are being inflicted. Thus, equity decrees the performance of a contract, and does not give damages for its breach. So, also, equity will, under certain circumstances restrain commission of destructive trespass; whereas, at common law, all that the aggrieved party could obtain, would be a money compensation for the injury. And so, again, a chancellor will sometimes compel a party specifically to make good his representation by which another has been misled, while in the common law action of deceit,

damages alone can be recovered. Bispham Equity, § 48, 10th Ed.

(20)

A purchaser of real property for value paid over his money without notice of any kind that said property was impressed with a trust, but received notice of such trust before obtaining a conveyance of the property.

As between such purchaser and the cestui que trust, who should prevail? Give reasons for your answer.

The cestui que trust should prevail on the principle of the maxim in equity "BETWEEN EQUAL EQUITIES, THE FIRST IN ORDER OF TIME SHOULD PREVAIL."

Perhaps the following is the best illustration of the application of the maxim; where a purchaser from a fraudulent trustee pays the purchase money in good faith and then receives notice before obtaining the conveyance, he cannot get the conveyance from the trustee as against the CESTUI QUE TRUST, because the equity of the latter is prior to that of the purchaser; so if the purchaser actually gets the conveyance after notice, the CESTUI QUE TRUST may have him declared a constructive trustee of the property on the same ground. Clark on Equity, § 28 (Ohio Edition) 1921.

On the principle of unjust enrichment, the purchaser can receive the money from the trustee. This principle applies where one has paid over money by mistake, not arising through negligence nor error of law, whereby another has been unjustly enriched or benefited.

(21)

(a) A was in possession of certain government bonds which he held in trust for B. In an action in a court of Equity by B against A to enforce the trust the court decided the issues in favor of B and ordered A to deliver the bonds to B. How may the court enforce its decree in case of A's refusal to deliver the bonds?

(b) Suppose in the above case the property was real property of which A held the legal title in trust for B. By what means could the court secure a conveyance or transfer of the legal title from A to B?

(a) By proceedings in arrest for contempt and an attachment of the property. When it is admitted by the pleading, or on the examination of a party, that he has in his possession, or under his control, money or other things capable of delivery, which being the subject of the litigation is held by him as trustee, for another party, the court may order it to be deposited in court or delivered to such party, with or without security, subject to its further direction. G. C. § 11899.

"WHEN IN THE EXERCISE OF ITS AUTHORITY, A COURT ORDERS THE DEPOSIT AND DELIVERY OF MONEY, OR OTHER THING, AND THE ORDER IS DISOBEYED, BESIDES PUNISHING THE DISOBEDIENCE AS FOR A CONTEMPT, THE COURT MAY MAKE AN ORDER REQUIRING THE SHERIFF TO TAKE THE MONEY OR THING AND DEPOSIT OR DELIVER IT IN CONFORMITY WITH THE COURTS DIRECTION. G. C. § 11900.

When the judgment is not for the recovery of money or real property, it may be enforced by attachment, by the court which rendered it, upon motion made, or by rule of the court upon the defendant; but in either case, notice of the motion, or a service of a copy of the rule, must be made on the defendant a reasonable time before making the order of attachment. G. C. § 11788.

(b) The decree of a court, would, by its own operation transfer title to the property. When the party against whom a judgment for a conveyance, release, or acquittance is rendered, does not comply therewith by the time appointed, such judgment shall have the same operation and effect, and be as available as if the conveyance, release, or acquittance had been executed conformably thereto. G. C. § 11590.

By this statute the decree of a court of Equity is made, by its own operation to transfer title to realty from one party to another. Jelke v. Goldsmith, 52 O. S. 499, 40 N. E. 167.

A court of Equity having acquired jurisdiction over the persons of the parties, may enforce a trust, or the specific performance of a contract in relation to land situated in another state. Burnley v. Stevenson, 20 O. S. 474.

(22)

(a) State briefly what the plaintiff must allege and prove in an action in a court of equity to reform a written contract on the ground of mistake in the terms of such contract.

(b) What must be the character of the evidence offered and introduced in support of the petition to justify the court in granting the relief prayed for in such action?

(a) To reform a contract, and then enforce it in its new shape, calls for a much greater exercise of the power of a chancellor than simply to set the transaction aside. Reformation is a much more delicate remedy than rescission. Hence, in order to justify a decree for reformation in cases of pure mistake, IT IS NECESSARY THAT THE MISTAKE SHOULD HAVE BEEN MUTUAL. Where the mistake has been on one side only, the utmost that the party desiring relief can obtain is rescission, not reformation. The case is, of course, different if any element of fraud exists; FOR IT HAS BEEN PROPERLY

HELD THAT WHERE THERE IS A MISTAKE ON ONE SIDE, AND FRAUD ON THE OTHER, THERE IS A CASE FOR REFORMATION. Bispham on Equity § 469, p. 774.

(b) The evidence must be CLEAR AND CONVINCING. Farr v. Ricker, 46 O. S. 265, 21 N. E. 354; and Simmons Creek Coal Company v. Doran 142 U. S. 417.

(23)

(a) State briefly your conception of the meaning of the maxim; "Equity regards that as done which ought to be done."

(b) Give example of the application of this maxim.

(a) This is a very important maxim, and one which lies at the foundation of many of the great doctrines of equity. For the purpose of reaching exact justice, equity will frequently consider that property has assumed certain forms with which it ought, in justice, to be stamped; that parties have performed certain duties, or carried out the terms of contracts, which they ought, in justice, to fulfill; and will regulate the enjoyment and transmission of estates and interests, accordingly.

(b) Thus, where a testator has imperatively directed land to be sold and turned into money, equity will consider that the conversion (as it is termed) has taken place from the instant of the testator's death and the subsequent devolution of the property will be governed by the rules which control, not real, but personal estate. And so, as it is the duty of a trustee to deal with the trust property for the benefit of the cestui que trust, a profit made in his own name will be regarded as made for the benefit of the trust estate. Bispham on Equity, § 44, p. 75, 76.

(24)

A sued B in the common pleas court of M county to recover damages for a breach of the covenants of warranty in a deed of conveyance executed by B to A.

The breach consisted in the eviction of A from a part of the premises conveyed by said deed. B by his answer denied the eviction and in a cross-petition set up that the covenants of warranty were inserted in the deed by mutual mistake, and prayed for the reformation and correction of deed in this respect.

The allegations of the cross-petition were denied by the plaintiff's reply.

Upon the trial of this case, what issue of fact should be tried first, and should the same be decided by the court or by the jury?

The issue of fact whether the deed was made by mutual mistake should be tried first, because if it was so executed,

it is in fact saying that it never existed. Hence there could be no action for breach of warranty if the deed never existed. It should be tried by the COURT, because G. C. § 11379 provides that issues of fact arising in actions for the recovery of money only, or of specific real or personal property, shall be tried by a jury, unless a jury trial be waived, or a reference be ordered as hereinafter provided; and G. C. § 11380 provides that ALL OTHER ISSUES OF FACT SHALL BE TRIED BY THE COURT, SUBJECT TO ITS POWER TO ORDER ANY ISSUE TO BE TRIED BY A JURY OR REFERRED. See Buckner v. Mear, 26 O. S. 514, Fol. in Gantz v. Gease, 82 O. S. 34, 41, citing Gill v. Pelkey, 54 O. S. 348.

(25)

Which of the following are equitable actions:
(a) Divorce.
(b) Injunction.
(c) Accounting.
(d) Contest of will.
(e) To vacate judgment.
(f) Annulment of marriage.
(a) No.
(b) Yes.
(c) Yes.
(d) No.
(e) No.
(f) Yes.

(a) The power to grant a divorce is a statutory and not a common law power. 14 Cyc 581, Olin v. Hungerford, 10 O.S. 268, 270; cited in State v. Kelley, 25 N.P.(N.S.) 1, 6.

Now, our court of appeals held recently in the case of Holland v. Holland that an action for divorce and alimony is not a chancery case in any sense of the word, but is an action wholly provided for and regulated by statute. Smith v. Smith, 20 N.P.(N.S.) 94, 95, 27 D. 508; see also, Stewart v. Stewart, 20 N.P.(N.S.) 273, 28 D. 173; Howe v. Howe, 21 N.P.(N.S.) 324; 29 D. 413; Downing v. Downing, 24 N.P. (N.S.) 241; Woodburn v. Home, 21 L.R. 533; Marleau v. Marleau, 95 O.S. 162; Wells v. Wells, 98 O.S. 448.

(b) The power to grant writs of injunction is one of the extraordinary powers of a court of equity and should be only exercised where the law, on account of its universality of application, is insufficient to afford a remedy. Powell v. Ashville, 11 N.P.(N.S.) 369, 382.

(c) The relief sought by the plaintiff (accounting) was in its nature equitable. Black v. Boyd, 50 O.S. 46, 53.

(d) No right exists to maintain an action to contest a will except as it is specifically provided by statute, and the right thus conferred is subject to the conditions and limita-

tions imposed. McVeigh v. Fetterman, 95 O.S. 292, 294, 116 N.E. 518.

It is to be observed that while an action to contest a will is often spoken of as a special statutory proceeding, it is after all a civil action, expressly made so by G.C.§ 12079. Clark v. McFarland, 99 O.S. 100, 101, 124 N.E. 164.

(e) The special proceeding provided by G.C.§ 11631, authorizing courts to vacate their own judgments rendered at a previous term is a cumulative remedy and not exclusive. Darst v. Phillips, 41 O.S. 514; Coates v. Bank, 23 O.S. 415; Howenstein v. Sweet, 13 C.C. 239, 7 C.D. 498.

(f) A court of chancery, in the exercise of its ordinary powers, will entertain jurisdiction, at the suit of the imbecile's guardian, to declare his marriage a nullity. Waymire v. Jetmore, 22 O.S. 271.

(26)

Smith sells a parcel of property to Jones who takes possession under a warranty deed. One year later Smith commences an action to set aside the transfer on the ground that he, Smith, failed to sign the deed at the time of the transfer. No other facts are pleaded by Smith. What maximum of equity would you set up for Jones in contravention of Smith's claim, and why? Be brief.

Equity regards that as done which ought to be done. By force of this maxim defective instruments are supplied. Thus conveyances defectively executed are enforced. 21 C.J. 202, § 195e; citing Junction Ry. v. Ruggles, 7 O.S. 1.

(27)

(a) An action is commenced to restrain the commission of a nuisance and to recover damages therefor. The court concludes that it will not grant an injunction. Has the court of equity the right to continue to exercise jurisdiction and award damages?

(b) A has knowledge that the city is constructing a system of sewers at large expense, which will pollute a stream passing thru A's land. A fails to file any protest with the city. The city completes the sewerage system. The stream is polluted. A claims that the same is a nuisance. He seeks to enjoin the city from polluting the stream. The city contends that the evidence shows that A also pollutes the stream. (1) Is A entitled to any equitable relief? (2) Is A estopped from raising the question? (3) Is A guilty of laches by reason of delaying any action until the sewerage system is completely constructed and in operation?

(a) Yes.

In an action to restrain the commission of a nuisance and to recover damages therefor, equity has jurisdiction and damages may be awarded, even if the court for some reason

considers that it will not grant an injunction. Standard Bag & Paper Co. v. Cleveland, 2 C.C.(N.S.) 111, 15 C.D. 380.

(b) 1. No.

2. No.

3. No.

An injunction, however, is refused. The granting of an injunction is always largely in the discretion of the court and the results to the public at large, now using the sewers we are asked to abate, must be considered. It appears from the proof that many private houses and manufacturing and mercantile establishments in the city of Cleveland are now connected with these sewers, which have been built at large expense. The health, as well as comfort and convenience, of thousands of citizens depends upon maintaining an outlet for the sewers and no other outlet is practical or can be obtained under the present system of sewage disposal in use in the city. Supra, p. 121.

From the fact that the evidence shows that the president of the plaintiff company was present and had knowledge of the system of sewers which was being constructed by the city at large expense, at the time of their construction; that he at that time made no protest; that he made no inquiry at the city hall to ascertain the extent of the contemplated discharge of sewage and was silent, it is argued that by his conduct he acquiesced in the construction of said sewers and that therefore plaintiff should be estopped from maintaining this action. We do not think the facts in the case warrant the application of the doctrine of estoppel. Supra, p. 116.

The defense of laches pleaded in the second amended answer is based upon the same facts as the defense of estoppel, and fails for the same reason that that defense fails. Supra, p. 116.

(28)

B sold C certain specified property together with certain existing patents and agreed that C should have the right to use any future patents in its shop that B might obtain. B further agreed that he would not thereafter manufacture any of such product at any time or place. Afterward B procured a patent upon a new invention of his own and entered into the manufacture of the newly patented article on his account, and adopted and placed on his product a trade mark, which he used for several years, when C adopted and used the same trade mark on its product. B sought to enjoin C from using the trade mark. C contends that there was a breach of agreement. Is B entitled to the relief prayed for?

Yes.

In an action by B to enjoin C from using such trade mark, it is not a defense to show that B, at the time of such

sale or subsequently, had also agreed that he would not engage in the manufacture of the same or similar articles. While C might have acquired the right to use B's new patent in its shop, it had not acquired the right to B's future trade marks.. Burch v. Toledo Plow Company, 15 C.C. 482, 8 C.D. 201.

(29)

A testator provided that the residue of his estate should be retained by his executor and invested by him during the life of his wife for her use, and that at her death it should be "appropriated and used by the executor for the advancement and benefit of the Christian religion, to be applied in such manner as in his judgment will best promote the object named." The widow sued as heir in a proper manner to set aside the will, claiming that the trust was void for uncertainty.

Should she recover? Why?

No.

Under identical facts, as above stated, it was held: that the testator had conferred ample power upon the executor to relieve the bequest of all objections arising from its indefinite character, and that so long as no obstacle exists to the exercise of the power at the proper time, the courts of this state will not, in advance of that time, interpose, on the application of the heir, to prevent its exercise. Miller v. Teachout, 24 O.S. 525; approved in Ins. Co. v. Wadsworth, 109 O.S. 440, 448; Becker v. Fisher, 112 O.S. 284, 296, 147 N.E. 744.

(30)

Lowe purchased certain real property of Turpie's at a sheriff's sale, under an arrangement between them by which Lowe should take a deed for the property and hold the same for himself and Turpie as equal owners. Lowe was to pay himself for Turpie's half of the purchase price out of certain other property of Turpie's. He subsequently did so pay himself, but transferred the whole of the property without consideration to his brother. Turpie then filed a petition to set aside the deed from Lowe to his brother and specifically to enforce the contract between himself and Lowe. Can he recover? Why?

Yes.

Under identical facts, as above stated, it was held that Turpie was entitled to a conveyance of an undivided half of said real estate. Turpie v. Lowe, 4 C.C. 599.

A resulting trust arises to the person from whom the consideration actually comes, or who represents or is identified in right with the consideration. An examination of the authorities shows, we think, conclusively that the actual money paid must be handed over at the time by the cestui

que trust; but if the purchase is made on his credit, or the trustee has in his hands money or property of the cestui que trust, which at the time is devoted or pledged to the payment, or some act is done equivalent to a payment, the resulting trust arises. Supra, p. 601.

(31)

Explain the meaning of, or give a definition for the following:

(a) Interpleader.
(b) Specific performance.
(c) Equitable estoppel.

(a) A proceeding devised to enable a person, of whom the same debt, duty, or thing is claimed adversely by two or more parties, to compel them to litigate the right or title between themselves, and thereby to relieve himself from the suits which they might otherwise bring against him. Webster's New International Dictionary, p. 1129. See G.C.§ 11265.

It is said in 4 Pomeroy's Equity Jurisprudence (4th Ed.), § 1322: From the whole course of authorities, it is clear that the equitable remedy of interpleader, independent of recent statutory regulations, depends upon and requires the existence of the four following elements, which may be regarded as its essential conditions: 1. The same thing, debt, or duty must be claimed by both or all parties against whom the relief is demanded; 2. All their adverse titles or claims must be dependent, or be derived from a common source; 3. The person asking the relief—the plaintiff—must not have nor claim any interest in the subject-matter; 4. He must have incurred no independent liability to either of the claimants; that is, he must stand perfectly indifferent between them, in the position of a stakeholder. State v. Guaranty Co., 107 O.S. 9, 16, 140 N.E. 657.

(b) By specific performance is meant, the actual performance of a contract by the party bound to fulfill it. As the exact fulfillment of an agreement is not always practicable, the phrase may mean, in a given case, not literal, but substantial performance. Waterman, Specific Performance, § 1; Bouvier's Law Dictionary, Baldwin's Revision.

Another authority defines it as: The performance of a contract according to its terms, or substantially so;—used chiefly with reference to such performance as decreed by a court of equity, where the common law remedy of damages would be totally inadequate and the specific performance not unjust to the defendant. Webster's New International Dictionary, p. 2005.

(c) Equitable estoppel arises where one has, by conversation or conduct, induced another to take a certain course of action, either affirmative or negative, to his benefit or

prejudice, said first party will not in good conscience and natural justice be permitted to subsequently, by conversation or conduct, declare the contrary. He is now estopped or prevented from doing the contrary to what he had theretofore done, upon which another party relied, and had good cause to rely, to his pecuniary benefit or prejudice. Kelley v. Hazzard, 96 O.S. 19, 22, 117 N.E. 182.

An estoppel in pais arises where one is prejudiced by the willful act or declaration of another upon whose conduct the former has rightfully acted. Hence, where the owner of goods sells to one on credit, and knowingly delivers to him a receipt drawn in such form, and given under such circumstances as to cause an innocent purchaser, buying from the vendee, rightfully to believe that the goods will be delivered upon compliance by said purchaser with certain conditions in the receipt contained, and he parts with his money in good faith upon the belief thus created, such purchaser has the right to avail himself of the terms of the contract and the vendor is estopped to afterward set up a lien for purchase-money and insist upon its payment as further condition to delivery of the goods. Ensel v. Levy & Bro., 46 O.S. 255.

(32)

Name three general classes of equitable jurisdiction and give an example under each.

1. Exclusive—Specific performance.
2. Concurrent—Contribution.
3. Auxiliary—Bill of discovery.

The most usual classification is that of exclusive, concurrent and auxiliary jurisdiction. Exclusive jurisdiction includes not only all cases in which the right is purely a creation of equity, such as the right of cestui que trust and the right of the mortgagor to redeem after condition broken, but also those cases where there is a common law right such as a right based upon a contract or tort and equity gives its own peculiar remedy, namely, specific performance of contracts and specific reparation or prevention of torts.

Concurrent jurisdiction embraces those cases where the right is legal and the remedy is of such a nature as a court of law would give, only that the legal remedy is considered not to be complete or adequate. An illustration of this occurs in the law of suretyship. At common law a surety who has paid the debt can recover contribution from his co-sureties only according to the number of sureties who were liable. In equity, however, he may recover according to the number of sureties who are solvent and within the jurisdiction, thus throwing the burden of possible loss due to such insolvency or absence upon all the other co-sureties equally with the plaintiff.

As its name implies, auxiliary jurisdiction was exercised for the purpose of aiding a party in a suit at common law. This was done either by a bill for discovery whereby his opponent was put on the stand and compelled to testify, or by a bill to perpetuate testimony whereby he was enabled to have preserved for a pending or anticipated action at law, some evidence which was in danger of being lost. This jurisdiction has been substantially, if not entirely, wiped out by legislation making parties competent to testify and making provision for the perpetuation of testimony. Clark, Principles of Equity, Ohio Ed., p. 38, § 34.

(33)

A enters into a written contract for the purchase of real estate from B and C. A knows that B and C are married, but their wives do not sign the contract. The parties to the contract contemplated that the property should be conveyed to A free from the dower rights of the wives of B and C. Without any fraud or collusion the wives refused to join in the execution of deeds conveying the property. A brings an action against B and C and their wives to compel specific performance of the contract. Is A entitled to the relief asked? If so, why? If not, why? Is there any other relief that can be afforded in the action? If so, what relief? and if not, why?

A is not entitled to specific performance, but may have an action for damages for breach of contract.

After a very careful consideration of the case of Peoples Sav. Bank Co. v. Parisette, 68 O.S. 450, we are unable to find a sufficient difference in the principal facts to justify us in declining to follow that case as an authority. The plaintiff knew that he was dealing with the husbands alone. He knew that they were married and that their wives could not be compelled to sign a deed, and that, therefore, the contract was impossible of execution if construed to include their dower interests. Such were also the controlling facts in the Parisette case * * *.

The supreme court recognizes in its decision that a different rule prevails in a number of states, but we think it deliberately announced a rule in this state which precludes the specific performance of a contract for the sale of real estate executed by a husband whose wife does not join in signing the contract of sale and refuses to join in the execution of the deed. This rule is subject to the qualification that such refusal upon the part of the wife shall not be the result of fraud or collusion upon the part of the husband and the wife * * *. Caple v. Crane, 10 App. 461, 468, 31 O.C.A. 225.

(34)

(a) The owner of a small local grocery sold the same with good will and stipulation not to engage in the grocery

business in the same city for five years.

(b) The owner of a dry goods store with a large patronage sold same with stipulation not to engage in the same business for one year.

(c) Principal employed agent as outside agent in Dayton, Ohio, on a salary of $4,000 and 10 per cent on sales effected, for a term of five years, with stipulation not to employ any other sales agent in that city during said period of time.

Can the above stipulations be enforced in equity? Assign reasons.

(a) Yes.
(b) No.
(c) Yes.

In Emler v. Ferne, 23 App. 218, 220, it is said:

Had the covenant in the contract under consideration provided that Emler should not engage in a business of his own for ten years in the city of Cincinnati, or elsewhere, the covenant would have been upheld, and the trial court would have been correct in so holding.

It will thus be seen that the contract would be upheld under (a) by authority of the above case. The same case reviews the Ohio authorities of Lange v. Werk, 2 O.S. 530, and Lufkin Rule Co. v. Fringeli, 57 O.S. 596, 49 N.E. 1030, and holds that similar provisions to those of (b) would be void as in general restraint of trade. It was a negative covenant. The court cannot make the contract for the parties. It cannot place a restriction on a negative covenant where there is no valid negative covenant.

In Lange v. Werk, 2 O.S. 520, 528, it is stated that a contract in restraint of trade can only be enforced when it is made to appear that: 1. The restraint is partial; 2. That it is founded upon a valuable consideration; and 3. That it is reasonable and not oppressive.

In the application of the doctrine of reasonableness of restraint, it has been held that there is no substantial difference whether the thing or value bargained for is contained in a contract of sale or in a contract of hiring. Tested by the principles above it will be seen that the contract under (c) is reasonable, founded upon a valuable consideration and in partial restraint of trade and is therefore valid.

(35)

An execution was issued for costs in a criminal case in which no judgment for costs had been rendered, levied on defendant's land, the land sold, and a sheriff's deed given therefor. The defendant, the owner of the land, thereupon filed a bill in equity against the sheriff and the purchaser to whom a deed had been given, to cancel the deed upon the ground that it constituted a cloud on his title and was null

and void, and setting up the above facts. To this bill the defendants demurred. Should the demurrer be sustained? Assign reasons.

No.

If there are jurisdictional or other defects rendering the judgment void ab initio, or if there is no judgment as a basis for the execution, or if the lien of the judgment has expired where the sale is of real property, the purchaser acquires no title. 23 C.J. 756, § 803.

An action may be brought by a person in possession of real property, by himself or tenant, against any person who claims an estate or interest therein, adverse to him, for the purpose of determining such adverse estate or interest; * * *. G.C.§ 11901.

Whenever a deed or other instrument exists which may be vexatiously or injuriously used against a party after the evidence to impeach or invalidate it is lost, or which may throw a cloud or suspicion over his title or interest, and he cannot immediately protect or maintain his right by any course of proceedings at law, a court of equity will afford relief by directing the instrument to be delivered up and cancelled, or by making any other decree which justice and the rights of the party may require. Eaton on Equity, p. 626, § 313.

Under these facts the purchaser cannot be heard to complain for: In Ohio the maxim caveat emptor is applied in all its force to judicial sales. Arnold v. Donaldson, 46 O.S. 73, 78; citing Vattier v. Executors, 6 O. 477; Corwin v. Benham, 2 O.S. 37; Creps v. Baird, 3 O.S. 277; Dunlop v. Robinson, 12 O.S. 530.

(36)

H agreed to purchase several lots of W and for which he gave him several promissory notes which were later assigned to G for value. It developed that H purchased these lots expecting that property would increase in value and was mistaken as to value. Will such contract be rescinded in equity?

No.

A court of equity never interferes to relieve against a contract, made in good faith, where both parties are mistaken as to value. Had any circumstance given a great and sudden rise to the lots, we could not have asked equity to give W a new bargain against H by increasing the price he was to pay. It was an equal risk, and equity cannot interpose. Hunter v. Goudy, 1 O. 449, 451.

Evidence

(Numbers in parenthesis refer to answers following.)

I. JUDICIAL NOTICE.

Criminal Law, 64 to 70; Evidence, 5 to 41.

G.C.§ 11498; 44 O.S. 622; 84 O.S. 81; 101 O.S. 132; 102 O.S. 609; 106 O.S. 359; 110 O.S. 82; 113 O.S. 546; 116 O.S. 291; 28 App. 434.

II. PRESUMPTIONS. (30b, 33)

Criminal Law, 71 to 75; Evidence, 44 to 77; Negligence, 115 to 121.

G.C.§ 710-176; 41 O.S. 486; 48 O.S. 296; 84 O.S. 165; 104 O.S. 389.

III. BURDEN OF PROOF. (9)

Criminal Law, 76 to 79; Evidence, 80 to 87; Negligence, 130 to 134.

G.C.§ 12083; 25 O.S. 584; 39 O.S. 215; 56 O.S. 162; 71 O.S. 317; 72 O.S. 262; 74 O.S. 124; 81 O.S. 121; 113 O.S. 682.

IV. RELEVANCY.

A. Facts in Issue and Relevant to Issues. (22, 32)

Evidence, 90 to 119.

G.C.§ 13662; 32 O.S. 604, 612; 50 O.S. 490; 19 App. 427.

B. Res Gestae. (15, 24, 29)

Criminal Law, 83 to 87; Evidence, 122 to 140.

23 O.S. 394; 26 O.S. 187; 32 O.S. 77; 77 O.S. 360; 90 O.S. 10; 118 O.S. 494; 13 App. 262; 20 App. 307; 26 N.P.(N.S.) 179.

C. Similar Facts and Transactions.

Evidence, 143 to 151.

80 O.S. 211; 84 O.S. 466; 111 O.S. 258; 24 App. 183.

D. Other Offenses and Acts Showing Intent, Malice or Motive.

Criminal Law, 93 to 103.

54 O.S. 365; 89 O.S. 390; 107 O.S. 478; 116 O.S. 265.

E. Materiality and Competency. (1, 7, 8)

Criminal Law, 114, 115; Evidence, 154 to 168.

32 O.S. 173; 12 App. 275; 5 C.D. 519; 12 C.D. 537.

V. BEST AND SECONDARY EVIDENCE. (39)

Criminal Law, 119, 120; Evidence, 171 to 188.

G.C.§ 11550; 20 O. 132; 17 O.S. 475; 26 O.S. 171; 31 O.S. 265; 33 O.S. 581; 38 O.S. 122; 17 App. 73; 6 O.F.D. 8.

[*References are to Bates' Compact Ohio Digest.*]

VI. REAL OR DEMONSTRATIVE EVIDENCE.

Criminal Law, 121; Evidence, 191 to 195.

G.C.§§ 11054, 11911, 13658; 76 O.S. 376; 87 O.S. 109.

VII. DECLARATIONS AND ADMISSIONS.

A. Nature, Form and Incidents in General. (26)

Evidence, 198 to 217.

33 O.S. 592; 47 O.S. 323; 49 O.S. 25; 65 O.S. 403.

B. By Grantor, Former Owner, or Privies.

Evidence, 220 to 222.

37 O.S. 194; 46 O.S. 373; 13 App. 240; 16 App. 110.

C. By Agents or Representatives.

Criminal Law, 127; Evidence, 225 to 236.

2 O. 61; 36 O.S. 647; 115 O.S. 161.

D. Declarations Against Interest.

Evidence, 208, 209, 239 to 243.

10 O.S. 418; 111 O.S. 108; 112 O.S. 429; 10 C.C.(N.S.) 486.

E. By Accused.

Criminal Law, 125 to 128.

23 O.S. 146; 91 O.S. 41; 22 App. 369.

F. By Person Injured; Dying Declarations. (29)

Criminal Law, 129.

8 O.S. 131; 11 O.S. 424; 35 O.S. 78; 44 O.S. 687; 47 O. S. 358; 56 O.S. 742; 65 O.S. 403.

G. By Criminal Conspirators and Co-defendants.

Criminal Law, 136 to 138.

4 C.D. 378.

VIII. HEARSAY. (10)

Criminal Law, 131; Evidence, 252 to 258.

19 O. 306; 41 O.S. 497; 20 App. 298; 20 App. 307; 8 O.F.D. 660.

IX. CONFESSIONS. (13)

Criminal Law, 160 to 167.

G.C.§ 13692; 23 O.S. 146; 25 O.S. 464; 39 O.S. 37; 24 App. 225.

X. CHARACTER AND REPUTATION OF ACCUSED.

Criminal Law, 103 to 108, 255.

18 O. 224; 77 O.S. 34; 87 O.S. 204; 13 C.C.(N.S.) 417; 119 O.S. 231.

XI. DOCUMENTARY EVIDENCE.

A. Official Acts, Records and Certificates. (30, 38)

Criminal Law, 141; Evidence, 261 to 288.

G.C.§§ 8557, 8571, 11498; 109 O.S. 519; 3 App. 141.

B. Exemplifications, Transcripts and Certified Copies.

Evidence, 291 to 301.

G.C.§ 8557; 17 O.S. 463; 17 O.S. 571; 4 C.C. 289; 12 C.C. 574; 13 C.C.(N.S.) 268; 10 C.D. 360; 2 O.F.D. 318.

C. Private Accounts, Records and Publications. (16)

Evidence, 304 to 332.

G.C.§ 11495(6); 31 O.S. 331; 38 O.S. 438; 11 C.C.(N.S.) 424.

D. Production and Authentication; Ancient Documents. (12, 14)

Evidence, 335 to 367.

G.C.§§ 11503, 11550 to 11555; 44 O.S. 690; 53 O.S. 482; 83 O.S. 385.

XII. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS. (6, 11, 23, 28)

Evidence, 370 to 453.

12 O.S. 201; 28 O.S. 371; 39 O.S. 618; 46 O.S. 265; 50 O.S. 528; 52 O.S. 64; 53 O.S. 498; 64 O.S. 1.

XIII. OPINION EVIDENCE.

A. Conclusions and Opinions of Witnesses in General. (8, 37)

Criminal Law, 147; Evidence, 456 to 488.

43 O.S. 270; 89 O.S. 28; 19 C.C.(N.S.) 289; 24 C.C.(N.S.) 60.

B. Subjects of Expert Testimony. (36)

Criminal Law, 148; Evidence, 491 to 509.

G.C.§§ 13608, 13609; 5 O. 5; 36 O.S. 195; 12 C.C.(N.S.) 353.

C. Competency and Examination of Experts. (36)

Criminal Law, 149, 150; Evidence, 512 to 529.

20 O. 211; 23 O.S. 358; 28 O.S. 541; 45 O.S. 309; 63 O.S. 236; 19 App. 262; 13 C.C.(N.S.) 592; 22 C.C.(N.S.) 462.

XIV. EVIDENCE AT FORMER TRIAL, OR IN OTHER PROCEEDINGS. (31)

Criminal Law, 171, 172; Evidence, 540 to 547.

G.C.§§ 11496, 11525 et seq; 5 O.S. 325; 66 O.S. 407.

XV. WEIGHT AND SUFFICIENCY.

A. In General, Circumstantial Evidence. (34, 35, 40a)

Criminal Law, 176 to 180, 258; Evidence, 550 to 567; Negligence, 147.

45 O.S. 1; 26 App. 478; 10 C.C.(N.S.) 149; 24 C.C.(N.S.) 1; 6 O.F.D. 666.

B. Degree of Proof, Reasonable Doubt, Preponderance of Evidence. (21, 34, 35)

Evidence, 568.

17 O.S. 626; 26 O.S. 2; 34 O.S. 157; 80 O.S. 289; 118 O.S. 442; 27 App. 245; 3 C.C.(N.S.) 156; 6 O.F.D. 666.

C. Corpus Delicti.

Criminal Law, 181.

16 O.S. 583; 23 O.S. 146; 94 O.S. 364; 5 C.C. 94.

D. Directed Verdict; Scintilla Rule. (40c)

Trial, 90 to 94; Negligence, 152.

64 O.S. 100; 99 O.S. 100; 100 O.S. 528; 103 O.S. 622; 104 O.S. 467; Article in 28 L.R. 477.

XVI. WITNESSES.

A. Competency. (17, 25, 26)

Witnesses, 16 to 102.

O. Const. Art. 1, § 7; G.C.§§ 11493 to 11495, 11988, 13659; 33 O.S. 27; 105 O.S. 508; 110 O.S. 105.

B. Examination; Privileged from Testifying. (7, 19, 20, 23, 40)

Witnesses, 102 to 124.

O. Const. Art. 1, § 10; G.C.§§ 11494, 13659, 13676; 26 O.S. 476; 34 O.S. 91; 44 O.S. 636; 54 O.S. 1; 101 O.S. 501; 116 O.S. 693; 119 O.S. 231.

C. Credibility and Impeachment. (17)

Witnesses, 127 to 171.

G.C.§§ 10515, 11495, 11988, 13673; 35 O.S. 271; 46 O.S. 320; 75 O.S. 270; 102 O.S. 18; 106 O.S. 481.

XVII. WHEN QUESTION FOR COURT OR JURY.

Criminal Law, 240 to 248; Trial, 66 to 74; Negligence, 152 to 166.

O. Const. Art. 4, § 6; G.C.§§ 11379, 11460, 11462, 11577; 29 O.S. 429; 45 O.S. 678; 53 O.S. 512; 113 O.S. 450; 115 O.S. 91; 14 App. 67.

XVIII. TRIAL; EXCEPTIONS AND OBJECTIONS. (1, 2, 3, 4, 5)

Trial, 1 et seq.

G.C.§§ 11419 to 11491, 11559 to 11574.

Definitions

JUDICIAL NOTICE.—A term used to express the doctrine of the acceptance by a court for the purposes of the case, of the truth of certain notorious facts without requiring proof. Bouvier's Law Dictionary, Baldwin's Revision.

RES GESTAE.—Those circumstances which are the automatic and undesigned incidents of a particular litigated act, and which are admissible in evidence when illustrative of such act. Events speaking for themselves through the instructive words and acts of participants, not the words and acts of participants when narrating the events. Bouvier's Law Dictionary, Baldwin's Revision.

PRIMA FACIE.—Prima facie evidence of fact is in law sufficient to establish the fact, unless rebutted. Bouvier's Law Dictionary, Baldwin's Revision.

HEARSAY EVIDENCE.—That kind of evidence which does not derive its value solely from the credit to be given to the witness himself, but rests also, in part on the veracity and competency of some other person. Bouvier's Law Dictionary, Baldwin's Revision.

CORPUS DELICTI.—The body of the offence; the essence of the crime. It is a general rule not to convict unless the corpus delicti can be established, that is, until the fact that the crime has been actually perpetrated has been first proved. Bouvier's Law Dictionary, Baldwin's Revision.

RELEVANCY.—Applicability to the issue joined. That quality of evidence which renders it properly applicable in determining the truth and falsity of the matters in issue between the parties to a suit. Bouvier's Law Dictionary, Baldwin's Revision.

ANCIENT DOCUMENT.—A document which is not less than thirty years old, the time to be computed from the date of the execution of the instrument. In order to render it admissable as evidence, there must be at least some evidence accounting for its custody and that it was produced from the proper custody; and there must be at least some evidence of its antiquity, although it may purport to be ancient. Wright v Hull, 83 O.S. 396.

COMPETENT WITNESSES.—All persons are competent witnesses except those of unsound mind, and children under ten years of age who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly. Throckmorton's General Code of Ohio, § 11493.

OHIO STATE BAR EXAMINATIONS

QUESTIONS WITH ANSWERS

[*Arranged Chronologically.*]

(1)

The attorney for the plaintiff in the trial of a case asks a question of a witness which is proper and competent. The answer of the witness is partly competent and partly incompetent. As attorney for the defendant you move to strike out the answer.

Is it error for the court to overrule your motion? Why?

No.

It is not error for the court to overrule my motion.

Where a witness is asked a question which is proper and competent, and the answer of the witness to it is partly competent and partly incompetent, and a motion is made to strike out the answer, it is not error to refuse such motion.

The motion was too broad, it included the whole answer, some of which was perfectly competent. That being the case the court did not err in refusing to sustain the motion. Circleville (City) v. Ella M. Sohn, 20 C. C. 368, 11 C. D. 193.

Where the answer to a question was partly proper and partly improper, a motion to exclude the whole answer should be overruled. This, where a nonexpert witness in response to a question concerning the person injured, stated that "he looked pale when he tried to work, he tried to hoe a minute or two and quit," and that "he was sickly and complained a great deal," the latter might properly have been excluded, but the motion to exclude being to the whole an-

swer, it was properly overruled. Railway Co. v. Goodwin, 12 C. D. 537.

(2)

In the trial of a case, evidence is offered by opposing counsel which is erroneously received and admitted by the court over your objection. The reasons given to the court for your objection are not sound. Was the court right in its ruling? Why?

No.

"When evidence is received and admitted over a party's objection, and such evidence is altogether incompetent and irrelevant, it is prejudicial error; and it is immaterial whether or not he gave the proper reason for his objection. Young v. State 16 C. D. 747, at p. 755. 6 C. C. (N. S.) 53, 56. Metzler's Ohio Trial Evidence p. 303, § 234 (c).

(3)

You are in the trial of a case. The opposing counsel asks a question of his witness in direct examination to which you object and the objection is sustained by the court. The opposing counsel says to the stenographer, "Please note exception to the ruling of the court." Is the ruling of the court reviewable on error? Why?

No.

The ruling of the court is not reviewable on error.

In order that the exception can be reviewed on error the opposing counsel should state what he expects to prove by his question. On failure to do this, the question cannot be reviewed on error.

"When a question to a witness is overruled, error will not lie, unless the exception shows what it was proposed to prove." Neff v. Cincinnati, 32 O. S. 215; Hamilton v. State, 34 O. S. 82.

"An exception to a refusal by the court to permit a witness to answer a question is not properly saved, unless it appears from the record what the answer would have been." Cincinnati v. Wever, 3 C. C. (N. S.) 56, 13 C. D. 651.

G. C. § 11560 states that a party objecting to a decision of the court on a matter of law, must except at the time it is made.

G.C. § 11562 provides that no particular form of exception is required. The exception must be stated, with the facts, or so much of the evidence as is necessary to explain it, and no more, and the whole as briefly as possible.

(4)

In the trial of a case, evidence is offered by the plaintiff which evidence is proper, but which is excluded because of your objection. The court erred in excluding the evidence. You seek to obtain a reversal on the ground that

the court erred in excluding the evidence. Will the reviewing court reverse the trial court? Why?

No.

The fact that the evidence was offered by the plaintiff and was proper but was excluded on objection by the defendant, clearly would not be ground for which the defendant could complain. The defendant got more than he deserved; for the evidence which he objected to, was excluded, not to his prejudice; so he cannot be heard now to complain. It is not one of the grounds for which he can take a case up on error, that the judge excluded evidence of the other party, to his benefit. It would be inconsistent.

Erroneous admission or exclusion of evidence will not constitute grounds for reversal unless it worked prejudice to the plaintiff in error. Whitman v. Keith, 18 O. S. 134 at p. 149. Where a defendant causes the exclusion of competent evidence, he cannot afterward object to the lack of such evidence. Jewelry Co. v. Hazen, 6 C. C. (N. S.) 606, 17 C. D. 697. State v. Kollar, 93 O. S. 89, 91, 112 N. E. 196. Metzler § 231 (a).

(5)

In the trial of a case, evidence is offered and admitted, which evidence was incompetent, but no proper means were exercised to have it taken from the jury. The reviewing court is asked to reverse the trial court on the ground of the admission of said incompetent evidence. What should be the holding of the reviewing court? Why?

The reviewing court should not look to the fact that the evidence was incompetent. The right to object to the competency of evidence is lost if not noted by exception at the time, (G.C. § 11560).

The reviewing court will not reverse the trial court, for it is too late to make that objection in the reviewing court, and it should refuse to look to such error.

Where the evidence is not objected to upon the trial, error as to its admission is waived. Billigheimer v. State, 32 O. S. 435, 440.

The rule is the same in criminal as in civil cases, that an objection to the admissibility of evidence, if not made at the trial, will not be ground of error, but will be considered as having been waived. Wm. Clark v. State of Ohio, 12 O. 483.

(6)

Jones makes a will in which he gives his property to his four children equally, subject, however, to charges made in his book of advancements. Parol evidence is offered by one of the children that an advancement charged against him in such book of advancements was not made.

Is such evidence competent? Why?

No.

Evidence is here asked to be introduced to vary a written document. The book of advancements was incorporated into the will. To allow parol evidence to be given now would be to allow parol testimony to be given to change the will. This clearly cannot be done.

To allow parol evidence of the intention of the testator in making an advancement to one of his children before executing his will, when not contained in the will would be to vary its terms by extrinsic evidence of the testator's intention, which is a violation of the fundamental laws of the construction of wills. Stichtenoth v. Toph, 23 W. L. B. 126, 10 D. Repr. 690.

Where the testator, in his will, in directing how his estate shall be distributed among his children, states that he has made certain advances of a certain amount to either of them, evidence is not admissible to disprove the fact or the amount of such advancements, but the will is conclusive as to these facts. Farmer v. Cope, 37 W. L. B. 132. See also Painter v. Painter, 18 O. S. 247; Younce v. Flory, 77 O. S. 71.

It is a well-settled principle that parol evidence can not be admitted to set aside an instrument unless on the ground of fraud or mistake. Hence this parol evidence can not be received to contradict the written intrument. Aaron A. Ferris Ex. v. James Goodin et al, 19 C. C. (N. S.) 477 at p. 479, 26 C. D. 110.

(7)

(a) As understood in the law of evidence applicable to the trial of issues of facts in courts, define briefly and distinguish the following terms: (1) Evidence; (2) Testimony and (3) Proof.

(b) As applied to evidence offered in the trial of an issue of fact, define briefly and distinguish the following terms: (1) Relevant; (2) Competent, and (3) Admissible.

(a) 1. "Evidence" is that which tends to prove or disprove any matter in question, or to influence the belief respecting it. It includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved. Bouvier's Law Dictionary, Baldwin's Revision.

Evidence means any matter of fact from which an inference may be drawn as to another matter of fact, which is sought to be established in the trial of a case. McKelvey on Evidence, p. 5.

Evidence is that which tends to influence conviction on the mind. Burns v. State 3 D. Repr. 122.

2. "Testimony" is "Evidence given by a witness under oath or affirmation." Baldwin's Law Dictionary, Baldwin's Revision.

The term "testimony" refers to the oral testimony of witnesses on the stand; while the term "evidence" is much broader, and includes the testimony of witnesses together with all other evidence, in whatever form it may be offered: Norwalk v. Christian, 25 C. C. (N. S.) 419, 28 C. D. 142; Knapp v. Scherck 2 C. C. (N. S.) 589, 14 C. D. 588.

3. "Proof" is the end which is sought to be reached by the use of evidence, testimony, or otherwise through inference. For other definition, see Bouvier's Law Dictionary, Baldwin's Revision.

Strictly speaking, the term evidence is applicable only to the medium of proof. In practice, however, it is often used interchangeably with the term proof. The latter term, however, strictly speaking, is applicable only to the effect of evidence. Hughes on Evidence, p. 1.

Hence we see that (1) Evidence is the means (2) Testimony is the manner and (3) Proof is the result.

(b) 1. "Relevant"—where the degree of connection between a fact tendered in evidence and the issue to be proved is not too remote, or, affirmatively stated, where the evidence is responsive to the matter sought to be proved by it.

The term relevant means that any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders provable the past, present or future existence or non-existence of the other. Stevens Digest of Evidence, Art. 1.

2. "Competent" Evidence is that evidence which the very nature of the thing to be proven requires, as the production of a writing where its contents are the subject of inquiry. Bouvier's Law Dictionary, Baldwin's Revision. 1 Greenleaf on Evidence § 2.

3. "Admissible"—pertinent and proper to be considered in reaching a decision. Used with reference to the issues to be decided in any judicial proceeding. Bouvier's Law Dictionary, Baldwin's Revision.

—That evidence which is not prohibited by the rules of exclusion.

(8)

In an action by A against B to recover the contract price of certain building work performed by A for B under an express parol contract, there was a conflict in the testimony on the issue of fact made by the pleadings as to what was the contract price. A offered evidence by the testimony of a qualified witness that the reasonable value of the work at the time of the contract was a certain figure equal to that claimed by A as the contract price. Was this evidence relevant to the issue and admissible? Give reasons for your answer.

Yes.

In an action to recover the amount due on a contract for work, when the testimony is conflicting as to the price agreed upon for the work, it is competent to show the value of such work at the time the contract was made, as tending to show what the agreed price was. The reason is that this evidence is of value, as tending to show the improbability of the claim of the defendant, and to enable the jury to arrive at the truth upon the point at issue between the parties. George Allison v. Anton Horning, 22 O. S. 138. Doctrine App. in Knott et al. v. Moore-Lamb Const. Co., 111 O. S. 45.

(9)

On whom is the burden of proof in an action on a negotiable promissory note by the payee against the maker, with respect to an issue of fact made by the answer and reply:

(1) When the answer alleges a want of consideration for the note;

(2) When the answer alleges failure of the consideration for which the note was given.

Give reasons for your answers.

(1) Where in suit upon a promissory note, the defense is that the note was given or obtained without a valuable consideration, the plaintiff has the affirmative of the issue, and the burden of proof rests upon him at every stage of the case to show a consideration for the note by a preponderance of the whole of the evidence adduced on the trial. Ginn v. Dolan, 81 O. S. 121, 90 N. E. 141; Klunk v. Railway Company 74 O. S. 125, 77 N. E. 752.

(2) But the plea of failure of consideration or a plea of payment presents a case very different from the defense of no consideration. These defenses confess and avoid. They are affirmative defenses; and the burden is upon the defendant from the beginning to the end. Ginn v. Dolan, 81 O. S. 121 at p. 129, 90 N. E. 141.

(10)

(a) State the reasons of policy on which the rule excluding hearsay evidence is predicated.

(b) State six exceptions to and qualifications of the rule.

(a) Hearsay is the evidence of those who relate, not what they know themselves, but what they have heard from others. Such mere recitals or assertions, whether oral or written, cannot be received in evidence for the reason that the party making them, is not under oath, and because the party against whom they operate, has no opportunity of cross-examination. Walter v. Bowling Green, 16 C. D. 756, 5 C. C. (N. S.) 516, 526. Metzler's Ohio Trial Evidence 162.

(b) The exceptions to the rule against hearsay are:
(1) "Ancient documents in support of ancient possessions";
(2) "Cases where the fact that the declaration was made, and not its truth or falsity, is the point in question";
(3) "Declarations, exclamations and statements which constitute part of the res gestae;"
(4) "Declarations as to pedigree;"
(5) "Entries in books in the regular course of business, or in discharge of official duty;"
(6) "Entries in books, against his interest, made by a person now deceased;"
(7) "Matters of public and general interest;"
(8) "Declarations against interest;"
(9) "Dying declarations;"
(10) "The testimony on a former trial of witnesses subsequently dead, absent or disqualified;"
(11) "Admissions and confessions." 1 Greenleaf on Evident §§ 102 et seq.

(11)

(a) State briefly in your own language the so-called parol evidence rule with respect to written instruments; and state the exceptions to and qualifications of the rule.
(b) Name three kind of cases included within such exceptions and qualifications in which the party offering the parol evidence is required to produce clear and convincing evidence in order to prevail against the terms of the written instrument.

(a) The general rule is that parol evidence is not admissible to add to, contradict, or vary the terms of a written instrument, nor to change, cut down, or alter the effect thereof. Serviss v. Stockstill, 30 O. S. 418; Monnett v. Monnett, 46 O. S. 30, 17 N. E. 659; Church v. Pennington, 10 C. D. 74, 18 C. C. 408; Bank v. Chandelier Co., 9 C. D. 807, 17 C. C. 443.
There are certain exceptions to this rule:
(1) When a written instrument is alleged to be invalid for fraud in its procurement, or any other reason, oral testimony is admissible to show the circumstances of the execution;
(2) The parol evidence rule applies only to the immediate parties to the instrument;
(3) It may always be shown that a document in question never had any legal existence, hence duress and fraud in the inception of the contract may be proved, also undue influence;
(4) It may be shown that the parties were without capacity to contract;
(5) Illegality, though not appearing on the face of the contract, may be shown;

(6) Parol evidence rule does not apply as to accident or mistake of fact;

(7) The rule does not exclude evidence of a distinct contemporaneous collateral agreement though such agreement was not reduced to writing, nor does it prevent proof of a subsequent parol agreement;

(8) The rule does not exclude proof that an instrument apparently transferring the absolute title is only given as security and thus a deed may be shown to be a mortgage;

(9) The fact that there was a condition precedent may be shown;

(10) Custom and usage may be shown. Jones on Evidence, § 434 et seq. Metzler's Trial Evidence, 416 et seq. McKelvey on Evidence, 533 et seq.

(b) Three classes of cases requiring clear and convincing evidence of the above exceptions to the parol evidence rule are those in which a written instrument is to be rescinded or reformed due to

1. Undue Influence. Order of Ry. Conductor's of Bland, 24 C. C. (N. S.) 169, 27 C. D. 220, 224.

2. Fraud. McDonald v. Schervish, 6 App. 88, 26 C. C. (N. S.) 394, 28 C. D. 405, 408.

3. Mistake. Farr v. Ricker, 46 O. S. 265, 21 N. E. 354.

(12)

(a) What is the rule in this state with respect to the witnesses competent to prove the execution of a written instrument that is required by law to be attested by witnesses, such as a deed?

(b) What was the rule at common law?

(a) "The execution of a deed or other written instrument, other than a will, may be proved by either one or more of the subscribing witnesses, the officer before whom the instrument was acknowledged, or the party who signed and executed the same." Garrett v. Hanshue, 53 O. S. 482, 42 N. E. 256.

(b) At common law the rule was that at least one of the subscribing witnesses must be produced for the purpose of proving the execution of an attested document, if such witness is available.

(13)

Jones was arrested for robbery. He with three others attacked the messenger carrying the payroll money for a manufacturing concern, grabbed the satchel having the money and later was captured. The only evidence against Jones is his own confession which was wrung from him by threats and abuse of the police department in questioning him and by what is generally known as the "third degree." Is this confession admissible in evidence, and why?

This confession is not admissible.

No confession can be received in evidence in a criminal case unless it was voluntary. A confession induced by hope or fear, excited in the mind of the prisoner by the representations or threats of anyone, is not to be considered as voluntary.

If the representations or threats were made by, or in the presence of a person having authority or control over the prosecution or the accused, it is to be presumed that the confession was produced by such representations or threats, unless it appear that their influence was totally done away before the confession was made. If, on the other hand, the representations or threats were made by any person having no such authority or control and not in such presence, it is not necessarily to be presumed that they induced the confession.

If satisfied, however, that the confession was produced by the representations or threats, the court cannot receive it in evidence, because the prisoner had sufficient mind or knowledge to detect the groundlessness of the representations or threats; for the strongest mind is liable to be unhinged, and the question is not what the prisoner ought to believe, but what did he believe. William Spears v. State of Ohio, 2 O. S. 583.

"To entitle a confession to admission, it must be voluntary, and made understandingly. If exorted or induced by the influence of either threats or promises of advantage, confessions are incompetent evidence. And as the law cannot measure the effect of such means upon the mind of a prisoner, confessions are excluded if it appear that any degree of influence has been exerted over the mind of the prisoner to procure them." Fouts v. State, 8 O. S. 98 at p. 108.

To exclude the confession, the threat or promise must be such as is calculated to induce a hope or advantage or fear of harm—as "it will be better for you to confess," or "it will be worse for you not to confess." Swan's Treatise, p. 160.

(14)

Name four ways in which a litigant may compel an opponent to produce evidence required to prove a material issue in the case.

1. Interrogatories, annexed to a pleading other than a demurrer. G. C. § 11348.
2. Depositions. G. C. § 11251 et seq.
3. Subpoena duces tecum. G. C. § 11503.
4. Action for discovery. G. C. § 11555.
5. Cross-examination. Martin v. Elden, 32 O. S. 282 at p. 287.

(15)

What is the meaning of the term Res Gestae?

By res gestae, is meant: "A thing done; a transaction." Baldwin's Law Dictionary, Baldwin's Revision.

Declarations which are part of the res gestae are declarations made at the time of the happening of an event by the parties participating therein and are admissible. McKelvey on Evidence, p. 343.

Declarations of this sort, to be admissible, must be made while the act is being done or the event is happening, or so soon thereafter that the mind of the declarant is actively influenced by it. McKelvey on Evidence, p. 345.

Metzler on Ohio Trial Evidence says: "Every fact that is so connected with a fact in issue as to form a part of the same transaction or occurrence though not in issue, is admissible in evidence if it tends to prove or disprove any facts in issue; and this is the rule even though it might be excluded as hearsay, if it were not a part of the same transaction or occurrence. And a party introducing part of a transaction will not be heard to object to other material facts occuring at the same time." Metzler's Ohio Trial Evidence, § 194.

By the term 'res gestae" is meant:

"Those circumstances which are the undersigned incidents of particular litigated acts and are admissible where illustrative of such acts. These incidents may be separated from the act by lapse of time more or less appreciable. Their sole distinguishing feature is that they should be necessary incidents of the litigated act—necessary in this sense: that they are part of the immediate preparations for or emanations from such acts, and are not produced by the calculated policy of the actors. They must stand in immediate casual relation to the act—a relation not broken by individual wariness seeking to manufacture evidence for itself. Therefore declarations which are the immediate accompaniments of an act are admissible as part of the res gestae; remembering that immediateness is tested by closeness, not of time but by causal relations, as just explained." State of Ohio v. Lasecki, 90 O. S. 10, at p. 13, 106 N. E. 660.

(16)

(a) With reference to wills, what is the meaning of the word "Probated?"

(b) How may a will be probated?

(c) How may a claim be proved against the estate of decedent?

(d) How may a claim be proved against a bankrupt's estate?

(e) How may a claim on an account be proved in the justice's court, municipal court, or in the court of common pleas?

(a) Probate, the proof before an officer authorized by law that an instrument offered as the last will and testament of a deceased person, is his last will and testament. When proved to the satisfaction of the officer it is received, filed and recorded, and is then said to be admitted to probate. Bouvier's Law Dictionary, Baldwin's Revision.

By probate is meant, the certification by the court or tribunal clothed with authority for that purpose, that the will has been executed by a competent testator in the manner required by law. Gardner on Wills, 2nd Ed., p. 276 § 95.

(b) The probate is effected by the examination in open court of the subscribing witness, and such others as any person interested in having the probate may desire. If a subscribing witness is absent, a commission to take testimony is issued, and if he is not accessible, other legal testimony is used. But only witnesses in favor of the probate are heard in Ohio, as contest is by an independent proceeding. Walker's American Law 422.

The testimony of the subscribing witnesses is received to show that the testator acknowledged the writing to be his last will and testament and that the testator signed it in their presence or acknowledged the signature to be his own and that the witnesses signed it in the testator's presence and at the testator's request.

(c) A claim may be proved against the estate of a decedent as follows:

When a claim is presented against the estate of such deceased person, the executor or administrator may require satisfactory vouchers in support of it and also the affidavit of the claimant that such claim is justly due, that no payments have been made thereon, and that there are no setoffs against it to his knowledge. Such oath may be taken before any officer authorized to administer oaths. The expense of it shall be allowed by the executor or administrator, if the claim itself is allowed. G. C. § 10717.

If the executor or administrator doubts the justice of such claim presented and so verified he may enter into an agreement in writing, with the claimant to refer the matter in controversy to three disinterested persons, who, if the claim does not exceed $100 shall be approved by a justice of the peace of the county in which the letters were issued. If the claim exceed $100, the referees must be approved by the probate judge. G. C. § 10718.

(d) A claim against a bankrupt's estate may be proved in the district court, as follows:

Proof of claims against a bankrupt's estate shall consist of a statement under oath, in writing, signed by a cred-

itor setting forth the claim, the consideration therefor and whether any, and, if so what securities are held therefor, and whether any, and, if so what, payments have been made thereon and that the sum claimed is justly owing from the bankrupt to the creditor. Nat'l Bankruptcy Act. § 57a.

Whenever a claim is founded upon an instrument of writing, such instrument, unless lost or destroyed, shall be filed with the proof of claim. If such instrument is lost or destroyed, a statement of such fact and the circumstances of such loss or destruction shall be filed under oath with the claim. After the claim is allowed or disallowed, such instrument may be withdrawn by permission of the court, upon leaving a copy thereof on file with the claim. § 57b.

Claims which have been duly proved shall be allowed, upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest, or their consideration be continued for cause by the court upon its own motion. Uniform Bankruptcy Act of 1898, § 57d. See In re Sumner, 101 Fed. 224.

(e) In an action upon an account primarily the plaintiff's own testimony is the highest and best evidence that can be offered of the facts set forth in his petition, or that of the witnesses who had the transactions, who performed the work, or who delivered the material described in his petition. Bennet v. Shaw, 12 C. C. 574, at p. 576, 5 C. D. 480.

Where the originals consist of numerous documents which cannot be conveniently examined in court and the fact to be proved is the general result of an examination of the whole collection, evidence may be given as to such result by any person who has examined the documents and who is skilled in such matters. Jones' Commentaries on Evidence, Vol. 2, § 206.

Where a party sues on an account, his account-book is competent evidence when it is testified by the party or any competent witness that the book is the account book of the party, that it is a book of original entries, that the entries were made by himself or by a person since deceased or by a person of the county. Bennett v. Shaw, 5 C. D. 480, 12 C. C. 574, 577.

It must be shown that the book is one of original entries, that the entries were made concurrently with transactions, that the items are proper subjects of book account and that the book fulfills all the requirements of an account book at common law. Kennedy v. Dodge, 10 C. D. 360. Bogart v. Cox, 4 C. C. 289, 2 C. D. 551. Page v. Zehring, 6 B. 299, 8 D. Repr. 211.

(17)

How may a witness be impeached?

(1) By showing on cross-examination, the bias or in-

terest of the witness, or his peculiar relation to the parties or his disparaged character.

(2) By disproving his statements, made in court, by the testimony of other witnesses.

(3) By proving statements of the witness, made out of court, inconsistent with or contradicting those made by him on the witness stand.

(4) By proving his general bad character for veracity. Jones on Evidence § 844, 3rd Ed. (1924). Greenleaf on Evidence, § 461, and Taylor on Evidence, 10th Ed., § 1470.

"No person shall be disqualified as a witness in a criminal prosecution by reason of his interest in the event thereof, as a party or otherwise, or by reason of his conviction of crime. Husband and wife shall be competent witnesses to testify in behalf of each other in all criminal prosecutions, and to testify against each other in all actions, prosecutions, and proceedings for failure to provide for, neglect of, or cruelty to their child or children under 16 years of age. Such conviction, interest, or relationship may be shown for the purpose of affecting credibility of such witnesses. G. C. § 13659.

(18)

May the full statement of a case by the attorney be accepted and relied on by the court and a valid judgment and decree rendered thereon?

Give reason or authority for your answer.

Yes.

If formal admissions are made by an attorney in the presence of the court, whether they be oral or written, expressed or plainly inferred from his conduct on which the opposite attorney and the court have the right to rely, the admissions and acts of the attorney are to be treated as those of the client; and are conclusive on him, unless fraud or collusion is shown. Stipulations in writing made by attorneys out of court dispensing with proof of certain facts are also conclusive upon their clients. The courts sometimes grant a nonsuit or in the federal courts direct a verdict upon the opening statement of the plaintiff's counsel, when such statements are unambiguous in their meaning, and in the opinion of the court clearly show that there should be no recovery. Jones on Evidence, 3rd Ed., § 257-9.

(19)

A and B are both clients of X a lawyer. Both of them consult this lawyer with respect to a certain matter which was not expected by either of the parties or the lawyer to reach stage of litigation. However, it so happened that the matter ripened into a lawsuit. Was the conversation

thus had with the lawyer privileged?—(a) As between the parties; (b) As to suits between either of such parties and strangers; (c) Does such privilege belong to the parties or to the attorney?

No.

(a) No. As between the parties, who consulted the attorney at the same time, there was no privilege.

G. C. § 11494 says that following persons shall not testify in certain respects (1) an attorney, concerning a communication made to him by his client in that relation, or his advice to his client. But this does not refer to the parties themselves who consulted the attorney at the same time.

(b) Yes.

The parties may testify as to what they said to the attorney, but the attorney cannot testify as to communications made to him unless by express consent of the client. However, if the client once takes the stand and testifies as to the conversation between himself and the attorney, the attorney may then be made to testify. The reason for this is on grounds of public policy for the law desires that clients consulting with attorneys be free to discuss matters frankly without fear of disclosure. King v. Barret, 11 O. S. 261. Fol. in Spitzer v. Stillings, 109 O. S. 297.

(c) It belongs to the parties. G. C. § 11494 provides that if the parties expressly consent, the attorney may testify. This section is intended for the benefit of the client and may be waived by the client. Baird v. Detrick, 8 App. 198, 28 O. C. A. 257(Aff. Baird v. Detrick, 20 N. P. (N. S.) 209, 28 D. 110.

(20)

Under what circumstances does the right of a party to cross-examine his own witness obtain?

(1) When the witness is HOSTILE to the party, calling him or who, for any reason, may be deemed an unwilling witness; (2) Where the questions are merely INTRODUCTORY, and designed to lead the witness more quickly to matters which are material to the issue, and (3) sometimes after the memory of a witness on a subject is exhausted, and when he has omitted some fact from want of recollection. (4) In cases where those, who, by reason of TENDER YEARS, OLD AGE, IGNORANCE or some INFIRMITY are unable to state important facts without some aid or suggestion. Jones on Evidence §§ 817, 818.

(21)

(a) In what character of cases does the rule that the party must prove his case by clear and convincing testimony obtain?

(b) What are the three degrees or measures of proof obtaining in Ohio?

(a) It is said that in cases where a charge of fraud is involved, the existence of a lost or spoliated will is to be proved, or cases in which it is sought to prove a contract to bequeath property by will, a mutual mistake sufficiently to justify the reformation of an instrument, or to establish a trust, or to show that a deed absolute on its face is a mortgage, and in cases involving kindred questions, the party who seeks relief must establish his right to recover by "clear and convincing proof." Merrick v. Ditzler, 91 O. S. 256, 110 N. E. 493.

(b) There are three degrees of proof obtaining in Ohio; namely:—

(1) By preponderance of evidence;

(2) By clear and convincing evidence;

(3) Beyond a reasonable doubt. Metzler's Ohio Trial Evidence §§ 67, 76, 83.

(22)

In a suit on a promissory note where the defense is forgery, is a question and answer thereto as to the state of the weather on the day the note purports to have been executed admissible? Give reasons.

No, such evidence is clearly irrelevant.

In general, the evidence offered, must be confined to the subject matter of the petition and the defense thereto. Collateral facts will be excluded which do not tend to prove the real subject in controversy, or form a link in the chain of proof of the principal fact or matter in dispute. Swan's Treatise, p. 122.

Evidence which does not relate to this issue and from which no inference as to facts embodied in the issue can be drawn is not admissible. Mefford v. State, 13 App. 106, 31 O. C. A. 543.

(23)

In an action to contest the validity of a last will and testament, is it competent for an attorney who drafted the instrument under directions of the testator to testify with respect to conversation had with testator at time the document was in preparation.

In case such attorney was a subscribing witness to the instrument, does the same ruling prevail? Give reasons.

No.

The testimony of an attorney is not competent to vary the terms of a written instrument prepared by him as such, and in a proceeding to construe a will the attorney who wrote the will and with whom the testator consulted concerning it, is not competent to testify concerning a communication made to him by his client, touching his estate, the

objects of his bounty, or the meaning and effect of provisions contained in the will." Knepper v. Knepper, 103 O. S. 529, 134 N. E. 476.

In a proceeding to contest a will, a conversation between the testatrix and her attorney is not admissible. Swetland et al. v. Miles, 101 O. S. 501, 130 N. E. 22, Aff. 31 O. C. A. 529, 35 C. D. 458.

No.

G. C. § 11494 disqualifies an attorney from testifying "concerning a communication made to him by his client in that relation, or his advice to his client," except by express consent of the client, and when a testator procures his attorney as a subscribing witness to his will, he, by that act, expressly consents that the attorney may testify as fully as any other fact affecting the validity of the will. The object of requesting a person to witness a will is to assure legal execution of the will and to preserve evidence thereof. Knepper v. Knepper, 103 O. S. 529, 134 N. E. 476.

This section (G. C. § 11494) precludes an attorney, in a proceeding to contest the will of his client, from testifying to matters that relate directly to communications made and advice given while the relation of the attorney and client exist; but he is not precluded from testifying like any other witness, when he is a subscribing witness to the will. Collins v. Collins, 110 O. S. 105.

(24)

Define Res Gestae.

RES GESTAE means literally THINGS DONE OR SAID.

It is obvious that what a person says at the time he does an act, explains the act itself or his intention. When, therefore, an act material to the controversy is proved, what was written or spoken at the time the act was done, is in general, inseparably connected with, and indeed forms a part of the act itself. These and the other surrounding circumstances, constituting part of act or transaction, are all admissible in evidence, according to the degree of their relation to the material act or fact to be proved. It will be seen, from what has been said, that a mere statement or account of a past transaction, however recent, cannot be received as evidence of such previous transaction, or of the cause or manner thereof. Thus in an action against a railroad company for injuries sustained by plaintiff by being precipitated into a ditch, what the plaintiff said while being helped out of the ditch, as to the cause of the accident, cannot be received. Swan's Treatise, p. 150.

(25)

What children are incompetent to be witnesses in a civil action?

Children under ten years of age who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly. G.C.§ 11493.

It is well settled that when a child under ten years of age is offered as a witness, and objection is made to the competency of such witness, it is the duty of the court to examine the witness and determine as a matter of law whether or not the witness has sufficient ability to receive impressions and relate facts and circumstances connected with the transaction truthfully, and that the question of whether or not the witness is competent to testify is largely in the discretion of the trial judge. While there are no reported cases on the subject in the supreme court of Ohio, there are such cases in other states, and no doubt the question has arisen many times in the lower courts of Ohio. There are reported cases where a child as young as six years of age has been held competent to testify. Crouch v. Fishbein, 29 O.C.A. 573, 575, 35 C.D. 607.

(26)

Jennie Jones and George Jones are husband and wife. While living together they have some conversation with each other in the presence of Smith. Shortly thereafter Smith dies. At a later date Jones sues his wife for an accounting and at the trial attempts to offer in evidence the conversation had with his wife in the presence of Smith. Counsel for Mrs. Jones objects. How should the court rule? State reasons. Be brief!

The court should rule against Mrs. Jones.

The next question presented for our consideration relates to the construction of R. S. § 5241 (now G.C.§ 11494) * * *.

Communications between husband and wife are not excluded on the ground of their common interest, or for the protection of those against whom they may testify, but because public policy requires that they shall not be allowed to betray the trust and confidence which are essential to the happiness of the married state. The reason for the exclusion ceases when the husband and wife conclusively show, by making the communication in the known presence of a third person competent to be a witness, that it is not of a confidential nature, and that its disclosure cannot violate any trust or confidence. We think the testimony was properly admitted. Sessions v. Trevitt, 39 O.S. 259, 267, 268; Morgan v. Bartlett, 3 C.C. 431, 2 C.D. 244.

(27)

A witness is asked to state a material conversation he claims to have had with the defendant over the telephone. Counsel object to the question on the sole ground that the

witness cannot positively say who was on the other end of the telephone wire. How should the court rule? State reasons. Be brief!

The court should overrule the objection of counsel.

Where a witness, in testifying as to a conversation had by telephone, makes a positive statement as to who it was with whom he conversed, and he is not cross-examined as to the identity of the person at the other end of the wire, the conversation is admissible notwithstanding the uncertainty which may exist as to the identity of the other party speaking. Pullman Co. v. Willett, 7 C.C.(N.S.) 173, 175, 17 C.D. 649.

(28)

Black is agent and sells a piece of real estate for White. A written contract is entered into between Black and White in which White agrees to pay Black a commission of five (5) per cent. Black performs fully but White refuses to pay and claims that before the contract was executed that Black and he agreed that Black was to receive the regular rate of commission approved by the real estate board of Cleveland, which was three per cent in full payment and that Black had refused to accept. Black sues White for a commission of five per cent. Upon the trial White offers to prove a conversation held just prior to the signing of the contract in which Black agreed to accept the regular Cleveland real estate board rate of commission. Counsel for Black objects. How should the court rule? State reasons. Be brief!

The court should rule in favor of Black.

It is well settled, as a general rule, that all parol negotiations between the parties to a written contract, anterior to, or contemporaneous with, the execution of the instrument, are to be regarded as either merged in it, or concluded by it. Accordingly, it is held, that parol evidence is incompetent to show terms or conditions at variance with, or in addition to, a written agreement, which the parties agreed to verbally, prior to, or at the time the contract was reduced to writing, but which were not inserted in the instrument. Thurston v. Ludwig, 6 O.S. 4, 5.

(29)

On the trial of an action for personal injuries the plaintiff offers a lay witness to testify to cries of pain and exclamations of suffering made by the plaintiff some time after the accident.

Is this testimony admissible?

No.

The cries and exclamations were not part of the res gestae, and thus it was hearsay evidence.

Witnesses were permitted, however, to state what he said on different occasions, some time after his injury—that his ankle hurt him, and similar expressions. This testimony, we think, ought not to have been admitted. Express declarations like these a long time after the injury, that his ankle pained him, or hurt him, ought to have been excluded. N. Y. C. & St. L. Ry. v. Willing, 5 C.C.(N.S.) 137, 139, 141, 14 C.D. 414.

(30)

(a) How do you prove the statutory law of another state?

(b) Is there any presumption that the statutory law of Indiana is the same as the statutory law of Ohio?

(a) Printed copies of written law enacted by another state, a territory of the United States, or foreign government, proved or purported to have been published by its authority, or proved to be commonly admitted as evidence of the existing law in the courts or tribunals thereof, respectively, on all occasions, by the courts and officers of this state, shall be admitted as presumptive evidence of such law. G.C.§ 11498.

Council for plaintiff in error insists that G.C.§ 11498 provides the exclusive method of proving statutory law of other states. This is one of the methods, but we do not think it is exclusive * * *.

We cite the following authorities as being decisive of the question:

Notwithstanding the provisions of G.C.§ 11498, which provide the method by which the statutes of other states may be proved in Ohio, they may also be proved by oral testimony of persons learned in the law who testify as experts with respect thereto. Brady v. Palmer, 19 C.C. 688.

On the trial in the court of common pleas, to prove the existing law of Pennsylvania governing savings institutions in making loans on interest, both sides produced evidence, in the shape of printed copies of statutes, and books of reports of cases adjudicated in the local tribunals; and the plaintiff introduced the depositions of witnesses learned in the law, and of long and extensive practice in the courts of that state. In the light of the evidence thus furnished by the record we are not disposed to reject the conclusions arrived at by the court below. Larwell v. Hanover Sav. Fund Soc., 40 O.S. 274, 280; Smith v. Rogers, 16 App. 110, 116, 32 O.C.A. 353.

(b) Yes, by majority of the authorities.

In the entire absence of direct or circumstantial evidence or of judicial cognizance, the common law, including equity, in a sister state or territory is presumed to be the same as the law of the forum. 22 C.J., p. 151, 155, § 87.

(31)

An important witness for the plaintiff testified for twelve hours on direct examination. The cross-examination, which would have taken several hours, had proceeded only ten minutes, when the witness was stricken with acute appendicitis. The jury was discharged, the case continued, and the witness hurried to a hospital, where he died two weeks later. The case was tried again in a few months. The plaintiff called as a witness the official stenographer at the former trial and offered to have the former testimony of the deceased witness read in evidence. The defendant objected. How should the court rule?

The court should rule for the plaintiff. See G.C.§ 11496. Under G.C.§ 11496, when a party or witness after testifying orally, dies, (or is for other reasons not available, or is unable to testify, or is summoned, but appears to be kept away by the adverse party) his testimony so given may be read or otherwise proved by either party in a further trial of the case. Smith v. Trac. Co., 24 N.P.(N.S.) 565.

(32)

A, on trial for murder, pleads self-defense, and offers testimony tending to prove that the deceased was a person of violent and dangerous character and that such character of the deceased was known to him at the time he took the deceased's life.

Is such evidence admissible in A's defense?

Give brief reasons for answer.

Yes.

It is conceded that in cases of self-defense it is competent for the defendant to prove the violent and dangerous character of the deceased at the time of the commission of the crime, if such character was then known to him. Marts v. State, 26 O.S. 162. The plain ground of this rule of evidence is that proof of the vicious character of the deceased, known to the prisoner, places the jury in a position to judge whether the prisoner entertained an honest and reasonable belief in the imminence of bodily harm to himself. State v. Roderick, 77 O.S. 301, 307, 82 N.E. 1082; L.R.A. 1916A, 1250n.

(33)

A sues the Ohio Oil Company, claiming damages for being run over by a truck. On the trial of his case he proves that he was injured by a truck which a witness testified had on it the words "Ohio Oil," the truck moving away too swiftly to afford an opportunity for the witness to decipher any other words.

Defendant moves for a directed verdict.

How should the court rule?

Give brief reasons for answer.

The court should allow the defendant's motion.

It is necessary that the plaintiff produce some evidence upon every element essential to create liability, or produce evidence of a fact upon which a reasonable inference may be predicated. An inference of fact cannot be predicated upon another inference, but must be predicated upon a fact supported by evidence. Sobolovitz v. Lubric Oil Co., 107 O.S. 204, 208, 210, 140 N.E. 634.

(34)

(a) By what degree of proof must the state establish the guilt of a defendant in a criminal case?

(b) What is the degree of proof before one can recover in a civil case?

(a) Beyond a reasonable doubt. Adams v. State, 31 O.S. 462.

(b) Preponderance of evidence. Merrick v. Ditzler, 91 O.S. 256, 260, 261, 110 N.E. 493.

(35)

A, charged with murder, offers the defense of an alibi. The court charges the jury that to maintain that defense he must establish it beyond a reasonable doubt.

Is the court's charge a correct statement of the law?

No.

Proof of alibi is satisfactory, if it only creates in jury reasonable doubt of guilt. Stevens v. State, 26 App. 53, 159 N.E. 834; State v. Norman, 103 O.S. 541, 543, 134 N.E. 474.

An alibi need not be proven by a preponderance of the evidence, if the evidence creates a reasonable doubt of defendant's guilt, even though the alibi is not fully proven, the verdict should be not guilty. Burns v. State, 75 O.S. 407; Waters v. State, 39 O.S. 215.

(36)

In an action for damages for personal injuries, a doctor was called as a witness. He testified that he had made an examination of the plaintiff since the suit was brought, for the purpose of giving medical attention. He was then asked what she had said to him in their conversation as to the character and seat of her injuries and sensations. The defendant objected.. The objection was overruled and the witness was allowed to testify what the plaintiff told him about her sensations at that time and at previous times since the date of the injury. Should the evidence have been admitted or not? Why?

Yes.

A physician in a case like this, although called to treat the plaintiff, can only testify to what the plaintiff said as to her physical condition, symptoms, sensations and seat of disease. L. S. & M. S. Ry. v. Yokes, 12 C.C. 499, 502, 5 C.D. 599.

While the statements of a patient to a physician of his pain and suffering, and in regard to his present bodily and mental condition, to enable the physician to form an opinion of the extent and nature of his injuries, are competent, it is not competent for the physician to testify to the patient's statements as to specific causes of injury, that being one of the issues before the jury. Indus. Com. v. Strassel, 11 App. 234, 236, 237; approving the above cited case. See, however, G.C.§ 11494.

(37)

A witness in a will contest was asked his opinion as to testator's capacity to make a will at the time decedent had executed the will in suit. Should answer be admitted? Why?

No.

The settled rule in this state as announced by our supreme court in Runyan v. Price, 15 O.S. 1, and reaffirmed by the same court in the more recent case of Bahl v. Byal, 90 O.S. 129, decided March 17, 1914, is as follows:

* * * nor can he be asked his opinion as to the capacity of a testator to make a will. Such inquiry involves a matter of law; also assumes that the witness knows the degree of capacity required to perform the act in issue. Burns v. Crowe, 31 O.C.A. 566.

(38)

(a) An action is commenced by a corporation. It is necessary to prove corporate existence. How prove it?

(b) In an action for damages for an alleged fraudulent sale of certain corporate stock, the plaintiff offered in evidence a newspaper advertisement of the defendant's, of stock previously sold by defendant in another corporation which defendant promoted. Was such evidence competent? Why?

(a) The existence of a corporation is satisfactorily proved by the production of its charter, the certificate required as to paid up stock, and the minutes of the election of its directors and the election and qualification of its officers. Hamilton, Glendale & Cin. Trac. Co. v. Cin., Dayton & Toledo Trac. Co., 47 B. 854.

A copy of the articles filed in the office of the secretary of state, certified by the secretary of state shall be prima facie evidence of the existence of the corporation named therein; * * *. G.C.§ 8623-117.

(b) No.

Circulars and letters sent out by a promoter are admissible in evidence in an action to recover for worthless stock sold, in so far as knowledge is thereby disclosed on the part of the promoter that the representations made by himself and his agents were false, but such letters and representations, however fraudulent, are not admissible where they relate solely to some other enterprise than the one in which the plaintiff purchased an interest. Russell v. Weiler, 7 C.C.(N.S.) 596, 18 C.D. 176.

The plaintiff in error's newspaper advertisement of stock for sale in another company which he promoted was erroneously admitted. Supra, p. 597.

(39)

(a) If evidence is competent for one purpose but is inadmissible for another, should such evidence be admitted? Why?

(b) May parol proof be offered as to the facts of the existence and transfer of a written document when no evidence has been offered tending to show that such written document has been lost or destroyed?

(a) Yes.

If evidence is competent for any purpose, it is admissible. Railroad v. Terry, 8 O.S. 570; Waterhaven v. Clive, 5 O. 136; Railroad v. Kelley, 6 C.C. 155, 3 C.D. 393.

(b) Yes.

The existence and transfer of a writing may be proved without producing the writing in order to introduce the declarations of the other party. Emrie v. Gilbert, W. 764.

(40)

Give your understanding of—(a) Weight of evidence; (b) Res ipsa loquitur; (c) Scintilla rule; (d) Privileged communications.

(a) Weight of evidence. This phrase is used to signify that the proof on one side of a cause is greater than on the other. Law Dictionary, Baldwin's Revision.

(b) Res ipsa loquitur. (Lat. the thing speaks for itself.) A phrase often used in actions for injury by negligence where no proof of negligence is required beyond the accident itself, which is such as necessarily to involve negligence. Bouvier's Law Dictionary, Baldwin's Revision.

All that the rule of res ipsa loquitur means is that the circumstances involved in or connected with an accident may be of such unusual character as to justify, in the absence of any other evidence bearing upon the subject, the inference that the accident was due to the negligence of the one having the possession or control of the article or thing which caused the injury, because in the absence of explanation, this is the

only fair and reasonable conclusion. Gas Co. v. Brodbeck, 114 O.S. 423, 433, 151 N.E. 323; Glowacki v. Ry. & Co., 116 O.S. 451, 463, 157 N.E. 21.

(c) Scintilla rule. The doctrine that where there is any evidence, however slight, tending to support a material issue, the case must go to the jury, since they are the exclusive judges of the weight of the evidence. Bouvier's Law Dictionary, Baldwin's Revision.

(d) Privileged communication. Communications made bona fide upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, if made to a person having a corresponding interest or duty, although it contain criminatory matter which without this privilege would be slanderous and actionable. Bouvier's Law Dictionary, Baldwin's Revision, see also G.C.§§ 11343, 11343-2, 11494.

Legal Ethics

Definitions

LEGAL ETHICS.—The principles of morally right and wrong conduct and character as expounded by the legal profession. Bouvier's Law Dictionary, Baldwin's Revision.

MAINTENANCE.—Whoever, being a judge, justice of the peace, clerk of a court, sheriff, coroner, constable, attorney or counselor-at-law, encourages, excites, or stirs up a suit, quarrel or controversy between two or more persons with intent to injure any of such persons, shall be fined not more than five hundred dollars. Throckmorton's General Code of Ohio, § 12847.

CHAMPERTY AND MAINTENANCE.—Maintenance is defined to be an officious intermeddling in a suit that no way belongs to one, by assisting either party, to the disturbing of the community by stirring up suits; champerty a species of maintenance, being a bargain with a party to divide the land or other matter sued for between them, if they prevail in the suit which the champertor undertakes to carry on at his own expense. Reece v. Kyle, 49 O.S. 481.

CANONS OF LEGAL ETHICS.—A copy of the canons of professional ethics as adopted by the American Bar Association will be found on page 367 of Bouvier's Law Dictionary, Baldwin's Revision.

OATH OF ADMISSION.—The oath of admission to the bar, as prescribed by the Supreme Court of Ohio, will be found in Answer (18), following.

OHIO STATE BAR EXAMINATIONS

QUESTIONS WITH ANSWERS

[*Arranged Chronologically.*]

(1)

The office of an attorney being an extraordinary privilege and honor, what qualifications should one possess?

A lawyer should possess the cardinal virtues of truth, simplicity and candor. Sharswood on Legal Ethics, p. 169.

He should be of the highest moral character and possess all the skill and learning that is humanely possible to achieve.

(2)

If the Supreme Court of Ohio admits you to the practice of law, what does it certify about you, which the public has a right to rely upon?

The supreme court certifies that you are sufficiently capable of discharging the duties of a counselor at law in an honorable and upright manner and that you are of good moral character.

The "good moral character" required to be possessed by an attorney at law has relation only to his character for integrity and honesty; it embraces only those moral traits of integrity and honesty which fit him to transact faithfully and honestly the business of an attorney at law. State v. Byrkett, 3 N. P. 28, 4 D. 89.

(3)

You are an attorney in a case and in consultation with your witnesses before trial. Would you tell them what you expect to prove before finding out what they know? Why?

No.

"I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the judge or jury by any artifice or false statement of law." Oath of Admission to Bar.

To have the witnesses' evidence conform to your proof is untruthful and dishonest and inconsistent with the oath of admission to the bar. An attorney should allow the witnesses to state what they know first since to state what the attorney desires to prove first is often calculated to influence a witness unduly in his favor.

It is unprofessional and dishonorable to deal other than candidly with the facts in taking the statements of witnesses, etc. Canons of Legal Ethics, Art. 2, § 22.

NOTE. The Canons of Professional Ethics as adopted by the American Bar Association will be found in Bouvier's Law Dictionary, Baldwin's Revision.—Ed.

(4)

If you are admitted to the bar, what duty as a practicing attorney will you give to the (a) Court, (b) your client, and (c) the public?

(a) It is the duty of the lawyer to maintain toward the courts a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Judges, not being wholly free to defend themselves, are peculiarly entitled to receive the support of the Bar against unjust criticism and clamor. Whenever there is proper ground for serious com-

plaint of a judicial officer, it is the right and duty of the lawyer to submit his grievances to the proper authorities. In such cases, but not otherwise, such charges should be encouraged and the person making them should be protected. Canons, Art. II, § 1.

"I will maintain the respect due to courts of Justice and judicial officers." Oath of Admission to Bar.

(b) "The lawyer owes "entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability, "to the end that nothing be taken or withheld from him, save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense. But it is steadfastly to be borne in mind that the great trust of the lawyer is to be performed within and not without the bounds of law. The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane. He must obey his own conscience and not that of his client. Canons, Art. II, § 15.

"I will maintain the confidence and preserve inviolate the secrets of my client, and will accept no compensation in connection with his business except from him or with his knowledge and approval." Oath of Admission to Bar.

(c) Stirring up strife and litigation is not only unprofessionable, but it is indictable at common law. A duty to the public and the profession devolves upon every member of the bar, having knowledge of such practices upon the part of any practitioner, immediately to inform thereof to the end that the offender may be disbarred. Canons, Art. II, § 28.

The counsel upon the trial of a cause in which perjury has been committed owe it to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities. Canons, Art. II, § 29.

"I will support the constitution of the United States and the State of Ohio.

I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any man's cause for lucre or malice." Oath of Admission to Bar.

The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. Canons, Art. II, § 15.

(5)

What do you consider the greatest thing an attorney owes to his profession?

Truth in all its simplicity—truth to the court, client and adversary, should indeed be the polar star of the lawyer. Sharswood on Legal Ethics, p. 167.

There is no profession in which moral character is so fixed as in that of the law; there is none in which it is subjected to severer scrutiny by the public. Sharswood on Legal Ethics, p. 169.

(6)

In this state what remedies has a client against an attorney at law who on demand therefor refuses to pay over money which he has collected for such client?

Such attorney at law receiving money for his client, and refusing or neglecting to pay it when demanded, shall be proceeded against in a summary way, on motion, before any court of record, either in the county in which the judgment on which such money has been collected, was rendered, or in the county in which such attorney resides, in the same manner, and be liable to the same penalties, as sheriffs and coroners are, for money received on execution. G. C. § 1711. For amercement, see Mulholland v. Groot, 24 C. C. (N. S.) 582, 11 C. D. 47.

The creditor may elect to bring an ordinary action against the attorney for the debt, if he so chooses, by assumpsit for money had and received. Christy v. Douglas, W. 485.

It is generally held that an action cannot be maintained against an attorney for money collected until a demand has been made by the client, though there may be such circumstances as will dispense with a demand. Douglas v. Cory, 46 O. S. 349, 21 N. E. 440.

The rule as to demand is designed for the protection of the attorney against the annoyance of unnecessary litigation and costs.

(7)

An attorney conducted a lawsuit for a client under an express contract as to fees which was invalid by reason of a champertous agreement by the attorney in said contract to pay the costs and expenses of the suit. The suit resulted in the client obtaining substantial relief as prayed for in his petition. Can the attorney recover of his client the reasonable value of his services in said suit by an action on quantum meruit?

Yes.

He may recover for the reasonable value of his services.

Although a contract between an attorney and client may be void for champerty, if the agreement and services are not otherwise illegal, an attorney may recover reason-

able compensation for services rendered. Brown v. Bruner, 10 App. 314, 29 O. C. A. 433.

It does not follow that because the contract was champertous, the plaintiff was without remedy. The law of champerty and maintenance had its origin in England where influential persons to whom rights of action were transferred in order to obtain their support and favor, harassed society and stirred up strife and litigation. "The power of the nobles became mighty in corrupting the fountains of justice and subverting the freedom and independence of the judicial tribunals." It was to remedy these evils that the law of champerty and maintenance was introduced. Under modern conditions the reason for the old rule has largely disappeared. The general tendency is toward a relaxation of the ancient doctrines relating to this subject.

There is nothing in good morals that requires the client to have the work done for nothing. He knew just what the services were to be and he got results that were valuable to him. Hence he (the attorney) should recover on quantum meruit. Supra., p. 434 and 435.

(8)

A is a practicing attorney in the city of C in this state. B is a member of the bar of a western state, but has moved to said city of C. B's business in the city of C is looking after his own investments and affairs. In course of B's business a considerable amount of legal work comes to him which he cannot handle because he is not a member of the bar of this state, and he desires to turn over all such legal matters to A for attention, upon condition that A will give B a portion of the fees received in such matters.

In your opinion would it be professional for A to make such arrangement with B? Give reasons for your answer.

No, this would be a form of advertising which is unethical according to § 27 of the Canons of Legal Ethics.

"Solicitation of business by circulars or advertisements, or by personal communications or interviews, not warranted by personal relations, is unprofessional. It is equally unprofessional to procure business indirectly through touters of any kind, etc. Canons of Legal Ethics, § 27.

(9)

Under what conditions and limitations may a lawyer properly render professional services for compensation before legislative or other bodies regarding proposed legislation, and in advocacy of claims before governmental departments?

A lawyer openly, and in his true character may render professional services before legislative or other bodies, regarding proposed legislation and in advocacy of claims be-

fore departments of government, upon the same principles of ethics which justify his appearance before the courts; but it is unprofessional for a lawyer so engaged to conceal his attorneyship, or to employ secret personal solicitations, or to use means other than those addressed to the reason and understanding to influence action. Canons of Legal Ethics, § 26.

(10)

(a) May an attorney who has been disbarred be again admitted to practice by thereafter passing an examination and receiving his certificate?

(b) May an attorney who has been disbarred be reinstated and again admitted to the practice by special act of the legislature?

Give reasons for your answers.

(a) No.

His admission to again practice must be obtained, if at all, through the court.

After removal from office, an attorney can practice again only if reinstated. He cannot apply to another court for admission to the bar de novo, without disclosing that he has been removed. If he is admitted by such other court, without making disclosure of the fact of such removal, such order of readmission will be set aside by the court making it. In re King 54 O. S. 415, 43 N. E. 686.

The court which suspended or removed an attorney may reconsider its decree and may modify it, if satisfied that the party has reformed, and that he has become a fit person to practice law. In re disbarment of Burke, 21 C. C. 34, 11 C. D. 397, In re Palmer 9 C. C. 55, 6 C. D. 179, 62 O. S. 643, 58 N. E. 1100.

(b) No.

An act which reinstates a disbarred attorney is unconstitutional in that (1) It is usurpation of judicial power, and (2) It is special legislation in a matter of a general nature as to which uniform operation is required. State ex rel, v. Brough, 15 C. C. (N. S.) 97, 23 C. D. 257.

A statute reinstating a disbarred attorney is a usurpation of judicial power, and is void. In re Thatcher, 12 N. P. (N. S.) 273, 22 D. (N. P.) 116.

(11)

Define Legal Ethics.

Legal Ethics is that branch of moral science which treats of the duties which a member of the legal profession owes to the public, to the court, to his professional brethern and to his client. Bouvier's Law Dictionary, Baldwin's Revision.

By "legal ethics" is meant the moral principles and codes of specialized rules that have been built upon them, which, in theory at least, are to govern the conduct of the practitioner as a practitioner. Warvelle on Legal Ethics, p. 19, § 31.

(12)

In the city of C they have attorneys and one of the judges of the court of common pleas makes a practice of sitting at one table for lunch. In the casual conversations had there, one of the attorneys would frequently bring up the legal questions in his cases for discussion and through carefully manipulating the conversation at the table, this attorney would attempt to secure an opinion on the points at issue from the judge there present.

(a) Was the conduct of this attorney ethical, and why?

(b) What was the duty of the judge, when such questions were submitted to him, and why?

(a) No.

Marked attention and unusual hospitality on the part of a lawyer to a judge, uncalled for by personal relations of the parties, subject both judge and lawyer to misconstructions of motive and should be avoided.A lawyer should not communicate or argue privately with the judge as to the merits of a pending cause. Canons of Legal Ethics, Art. II, § 3.

Of necessity a judge, to some extent, must mingle with his brethern of the bar, in a social way, and his judicial position usually exerts a decided influence on the manner in which he is received. But while a due courtesy may always be shown to a person occupying judicial station, it is yet contended that such courtesy has its limitations and that the same may be pushed beyond the bounds of sound ethical precept. Thus it is said, marked attention and unusual hospitality to a judge when the relations of the parties are such that they would not otherwise have been extended, subject both judge and attorney to hostile criticism and possible misconstruction of their acts, and hence, that same should be sedulously avoided.

A palpable attempt to gain special personal consideration in favor of a judge is mean and contemptible and the judge who seems to lend himself to such an attempt is deserving of no more respect than the attorney. Warvelle on Legal Ethics, 2nd Ed., p. 188, 189.

(b) It was the duty of the judge to refuse to answer such questions and the attorney deserves rebuke and denunciation for any device or attempt to gain from a judge special personal consideration or favor. Art. II, § 3, Canons of Legal Ethics.

(13)

A is a lawyer, and convinced that he had a complete right for his client against B's client. A knows that the claim of his client in good morals is unjust. A's client insists upon enforcement of his claim.

What is A's duty, and why?

A's duty is to refuse to take the case. In the oath of admission to the bar, 3rd paragraph, it provides "I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust, nor any defense except such as I believe to be honestly debatable under the law of the land."

It is a duty which every honorable practitioner owes to the bar, the court, and society to decline a case which, on its face, is unmistakably tainted with immorality or opposed to the known rules of public policy. Cases will sometimes be presented where counsel's legal discrimination will at once perceive its inherent vice. In such event there is but one honorable course to pursue and that is to advise the client that his case is unjust and refuse to advocate it. Warvelle on Legal Ethics, 2nd Ed. (1920) p. 159, 160.

(14)

A lawyer is employed to defend a wealthy criminal. After digesting his case and interviewing the witnesses to prove it, and being convinced that he has a complete defense to the charge against his client, he learns from his client that his client's friends are hiring private detectives to work with the State's witnesses and to mingle after court hours with the jurymen who may be called upon to hear the case and to impress upon these jurymen their suggestions as to the nature of the offense with which A's client is accused and to influence and to fix opinions by the power of suggestion in the prospective jurors' minds.

(a) What is A's duty to his client, and why?

(b) What is A's duty to the court, and why?

(a) It is the right of the lawyer to undertake the defense of a person accused of crime regardless of his personal opinion as to the guilt of the accused, otherwise innocent persons victims only of suspicious circumstances, might be denied proper defense. Having undertaken such defense, the lawyer is bound by all fair and honorable means to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty but by due process of law. Canons of Legal Ethics, Art. II, § 5.

A should request his client to desist from his illegal methods and in case of the client's failure to comply with such request, A should terminate his relations with his client. See Art. II, § 16, Canons of Legal Ethics.

(b) A lawyer should use his best efforts to restrain and to prevent his client from doing those things which the

lawyer himself ought not to do particularly with reference to their conduct towards courts, judicial officers, jurors, witnesses and suitors. If a client persists in such wrong-doing, the lawyer should terminate their relations. Art. II, § 16, Canons of Legal Ethics.

(15)

Is it ethical for an attorney to solicit business, and why?

The publication or circulation of ordinary simple business cards being a matter of personal taste or local custom, and sometimes of convenience, is not per se improper. But solicitation of business by circulars or advertisements, or by personal communications or interviews not warranted by personal relations, is unprofessional. It is equally unprofessional to procure business by indirection through touters of any kind, whether allied real estate firms or trust companies advertising to secure the drawing of deeds or wills or offering retainers in exchange for executorships or trusteeships to be influenced by the lawyer. Indirect advertisement for business by furnishing or inspiring newspaper comments concerning causes in which the lawyer has been or is engaged, or concerning the manner of their conduct, the magnitude of the interests involved, the importance of the lawyer's position, and all other like self-laudation, defy the traditions and lower the tone of our high calling, and are intolerable. Canons of Legal Ethics, Art. II, § 27.

The ethics of the legal profession forbid that an attorney should advertise his talents or his skill as a shop keeper advertises his wares and public policy is distinctly opposed to any efforts that may tend to invite or encourage litigation.

It is admitted that a plain and modestly lettered card carries with it a certain dignity and is therefore proper. Furthermore attorneys pursuing a branch of the law may also announce their specialty in a dignified manner.

It is customary to announce names and business locations by means of signs, and while this is advertising, it is not considered unethical when done in a dignified manner; but newspaper advertising is considered intolerable. Warvelle on Legal Ethics, § 92 et seq.

(16)

Until very recently in Ohio, lawyers only, of the various professions, were required to take an oath before being admitted to practice. Why should this be so?

Because, in America where the stability of courts and of all departments of government rest upon the approval of the people, it is peculiarly essential that the system for es-

tablishing and dispensing justice be developed to a high point of efficiency and so maintained that the public shall have absolute confidence in the integrity and impartiality of its administration. The future of our Republic, to a great extent, depends upon our maintenance of Justice pure and unsullied. It cannot be so maintained unless the conduct and the motives of the members of our profession are such as to merit the approval of all just men. (Preamble to Canons of Ethics, p. 3).

These principles were realized from a very early date, while other professions not being so closely connected to the government; it was not considered so important that they take oath before being admitted to practice their profession.

(17)

What is the duty of a lawyer?
(a) To his state or county;
(b) To the court;
(c) To his client;
(d) To his professional brother, who chances to be his adversary in a given case?

(a) He should ever support the constitution of his state, and the principles of the oath of admission to the bar.

(b) It is the duty of the lawyer to maintain towards the courts a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Judges, not being wholly free to defend themselves, are peculiarly entitled to receive the support of the bar against unjust criticism and clamor. Whenever there is proper ground for serious complaint of a judicial officer, it is the right and duty of a lawyer to submit his grievances to proper authorities. In such cases, but not otherwise, such charges should be encouraged and the person making them should be protected. Art. 1. Canons of Legal Ethics.

(c) The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences, forbids also the subsequent acceptance of retainers, or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

It is the duty of a lawyer at the time of retainer, to disclose to the client all the circumstances of his relations to the parties, and any interest in, or connection with the controversy, which might influence the client in the selection of counsel. Canons of Legal Ethics, Art. 6.

The lawyer owes "entire" devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability," to the end that nothing be taken or be withheld from him,

save by the rules of law, legally applied. No fear of judicial disfavor or pubic unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense, but it is steadfastly to be borne in mind that the great trust of the lawyer is to be performed within and not without the bonds of the law. The office of attorney does not permit, much less does it demand of him for any client, violation of law, of any manner of fraud or chicane. He must obey his own conscience and not that of his client. Canons, Art. 15.

(d) Clients, not lawyers, are the litigants. Whatever may be the ill-feeling existing between clients, it should not be allowed to influence counsel in their conduct and demeanor, or toward each other, or toward suitors in the case. All personalities between counsel should be scrupulously avoided. In the trial of a cause, it is indecent to allude to the personal history, or the personal peculiarities and idiosyncrasies of counsel on other side. Personal colloquies between counsel which cause delay and promote unseemingly wrangling, should also be carefully avoided. Canons, Art. 17.

THE CONDUCT OF THE LAWYER before the court and with other lawyers, should be characterized by CANDOR AND FAIRNESS. Canons, Art. 22.

(18)

Give the oath prescribed by the rules of the Supreme Court of Ohio, to be taken by successful candidates for admission to the Bar, or as much of it as you can.

I do solemnly swear;

I will support the constitution of the United States and the constitution of the State of.....:

I will maintain the respect due to courts of Justice and judicial officers;

I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust, nor any defense except such as I believe to be honestly debatable under the law of the land;

I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the judge, or jury by any artifice or false statement of fact or law;

I will maintain the confidence and preserve inviolate the secrets of my client, and will accept no compensation in connection with his business except from him or with his knowledge and approval;

I will abstain from all offensive personality, and advance no fact pre-judicial to the honor, or reputation of a

party or witness, unless required by the justice of the cause with which I am charged;

I will never reject from any consideration, personal to myself, the cause of the defenseless, or oppressed, or delay any man's cause for lucre or malice. SO HELP ME GOD. Oath of Admission to The Bar, Art. 32; Canons of Legal Ethics, Bouvier's Law Dictionary, Baldwin's Revision.

(19)

If not able to give the oath literally, give the points covered by it.

For answer to this question see next proceeding question.

(20)

What views do you entertain with respect to election of judges on non-partisan ballot? How far ethically can a candidate for such position go in an effort to advance his interest? That is—

(a) Should he make a non-political address at a partisan meeting?

(b) Should he write or publish statements of a partisan character?

(c) Should he give to the public a statement of his views on judicial process and procedure pending the campaign? Would you draw a line in this respect as between an incumbent and one in private life?

The answer to this question is largely a personal matter. Our personal opinion is as follows: "It is peculiarly essential that the system for establishing and dispensing justice be developed to a high point of efficiency and so maintained that the public shall have absolute confidence in the integrity and impartiality of its administration." The foundation of the election of a judge should be a well merited reputation for professional capacity and fidelity to trust rather than the political party to which he adheres. Hence we recommend non-partisan ballot to the end that he shall be elected on no other basis than his capacity to serve the public.

(a) There seems to be no good reason why a candidate for the office of judge should not make a non-political address at a partisan meeting if he desires to do so. By so doing, he is not courting support through party affiliations.

(b) No.

A judge should be elected upon a well merited reputation for professional capacity rather than political influence. Hence to publish statements of a partisan character would be clearly unethical.

(c) He should not give to the public such a statement. To do so would tend to influence the people in his favor, not

because of his well merited reputation for professional capacity, but rather on his future promises as to what he hoped to accomplish if elected.

A distinction in this respect should be drawn between an incumbent in office and one in private life. There is no objection whatever to a person giving his views on the subject of judicial process if his motive for doing so, is not for election, but rather to correct alleged defects in our judicial system.

(21)

Under what circumstances should a lawyer be a witness in a case in which he is also counsel?

1. When he testifies to merely formal matters, such as the attestation or custody of an instrument and the like;
2. When essential to the ends of justice. Canons, § 19.

There may, perhaps, be occasions when an attorney is justified in taking the stand, as when the trial develops some unlooked for phase which directly implicates or impugns his professional integrity, but such occasions will be few and far between. So, too, it is not considered improper for an attorney to testify to merely formal matters, which do not affect the original merits of the controversy. Warvelle Legal Ethics, p. 119, § 194.

(22)

(a) Give your idea of the necessary qualities of a good judge.

(b) Define the duties of a member of the Bar to the Court before which he is practicing.

(a) In the first place, he should be profoundly learned in all the learning of the law, and he must know how to use that learning.

In the next place, he must be a man, not merely upright; not merely honest and well-intentioned—this of course—but a man who will not respect persons in judgment.

And, finally, he must possess the perfect confidence of the community, that he bear not the sword in vain. Taken from argument of Rufus Choate, before the Massachusetts Constitutional Convention, and quoted in Jessup "The Professional Ideals of the Lawyer," p. 56, 57, 58.

(b) It is the duty of the lawyer to maintain towards the courts a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Judges, not being wholly free to defend themselves, are peculiarly entitled to receive the support of the bar against unjust criticism and clamor. Whenever there is proper ground for serious complaint of a judicial officer, it is the right and duty of the lawyer to submit his grievances to the proper authorities.

In such cases, but not otherwise, such charges should be encouraged and the person making them should be protected. Canons, § 1.

(23)

Is it permissible for a lawyer to defend a man charged with crime whom he knows to be guilty? In such a case would it be ethical for the lawyer to secure evidence tending to prove his client's innocence?

Yes.

Yes.

It is the right of the lawyer to undertake the defense of a person accused of crime, regardless of his personal opinion as to the guilt of the accused; otherwise innocent persons, victims only of suspicious circumstances, might be denied proper defense. Having undertaken such defense, the lawyer is bound by all fair and honorable means, to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law.

Before the law all men are equal, and guilty men have the same right to be defended and to be represented by counsel as have the innocent. This right is extended to all in the furtherance of public justice, and is founded upon the principle that no one shall be convicted except on legal and sufficient evidence. But this principle also defines the scope and extent of the advocate's duty in constructing a defense of this kind. He is merely bound to screen his client from conviction on incompetent and insufficient evidence, and to use all fair arguments that may arise from the trial. He may expose the weak parts of the evidence against him and enlarge on those parts that tend to his favor; he may even exhibit, as fully and as forcibly as he can, any hypothesis consistent alike with the evidence and the possible innocence of his client. Warvelle, p. 135, 136, § 224.

(24)

A recovers a judgment against B. Your client B asks you to advise him how to defeat A in the collection of his judgment. Would you advise him how to cover up his property to protect it against execution? Would you advise him to file a petition in bankruptcy?

No.

* * * The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane. Canons, § 15.

When the facts justify advising a client to take bankruptcy, it is not improper, but to so advise in order that the client may commit fraud upon his creditors is unethical, for the reasons above stated.

(25)

You are employed as counsel, and your client pays a small retainer fee and agrees on the date of trial to pay the balance of your fee. On the day of trial your client informs you that he has been unable to raise balance of fee and asks you to proceed with his case.. Would you be justified in withdrawing from the case by reason of the failure of your client to raise balance of fee?

No.

I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any man's cause for lucre or malice. Last Paragraph, Oath of Admission to Bar.

(26)

Give causes or grounds in this state for the suspension or removal of an attorney from office or the practice of law. What is the procedure in such case?

1. Misconduct or unprofessional conduct in office involving moral turpitude.

2. Conviction of a crime involving moral turpitude. G.C.§ 1707.

The statutory order of procedure is as follows:

1. Knowledge coming to a judge of the probable guilt of an attorney.

2. Proceedings caused by the judge to be instituted against the attorney by the appointment of a person or persons to file and prosecute charges.

3. The filing of written charges, etc. Preusser v. Faulhaber, 15 C.C.(N.S.) 110, 111, 23 C.D. 312, 313 [aff. 82 O.S. 466 mem.], G.C.§§ 1707, 1708.

(27)

(a) Define attorney at law.

(b) Is the office of attorney at law a property right?

(a) An attorney at law is an officer in a court of justice, who is employed by a party in a cause to manage the same for him. Bouvier's Law Dictionary, Baldwin's Revision, 6 C.J. Para 3 C., p. 566; see also, G.C.§ 1700.

(b) No.

The office of attorney at law is not a property right but is an extraordinary privilege, which one is entitled to have conferred on him upon showing his possession of certain moral and educational qualifications which he must reasonably retain in order to continue in that relation. Thatcher in re, 9 L.R. 437, 444; 16 O.F.D. 645.

(28)

Many federal courts are at present out of funds with which to operate. Would it be proper for a rich lawyer, the

head of a law firm having a large practice in a federal court, to donate to such court sufficient money to operate during the period of deficiency?

No.

Such a gift would be construed by the public as a bribe, for the purpose of securing to the donor special favors and privileges not enjoyed by other members of the bar of that community. It is the duty of the lawyer to uphold the honor of the court and to increase the respect of the public for the administration of justice. Canons, § 32.

It is unethical for an attorney to exert personal influence upon the court by means of gifts, hospitality, etc. Canons, § 3.

(29)

James Gray and John Nolan come into your office and James Gray employs you to draft a deed conveying certain property to John Nolan. Before the deed is drafted you discover that the title to the property is defective. Should you divulge this fact to John Nolan who has had nothing to do with your employment as attorney?

Yes.

Among the questions propounded to and decided by the committee on Professional Ethics of New York County Lawyers' Association was the following:

A and B come into the office of C, an attorney, and A employs him to draft a deed conveying certain property to B. Before the deed is drawn, C discovers that the title to the property is defective. Should he divulge this fact to B, who has had nothing to do with his employment? Answer: In the opinion of the committee, the question implies that B reposes trust and confidence in C as a lawyer; and in effect, that the lawyer is asked to represent both parties. Therefore, in the opinion of the committee, C should disclose the defect to both A and B. If C is not acting for B, the committee is of the opinion that C should only continue to act for A after advising B to secure separate counsel. Jessup "Professional Ideals," p. 147.

(30)

You are attorney for the plaintiff in the case of John Ames v. William Hall. Robert Ross is the attorney for the defendant. Your client desires to settle the case, but does not want to pay as much as Robert Ross is asking for his client. Mr. Ames tells you that if you would deal directly with Mr. Hall that the case could be settled much cheaper and suggests that you talk to Mr. Hall.

Would it be proper for you to go directly to Mr. Hall and attempt to negotiate a settlement?

No.

A lawyer should not in any way communicate upon the

subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel. It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law. Canons, § 9.

(31)

A defendant was acquitted on a liquor charge before a municipal judge. After the acquittal two lawyers, who were also editors of the local paper published an article in it charging the acquittal was secured by prostitution of the machinery of justice to serve the exigencies of the Republican party, and that since the judges were Republican, they were unanimous for once in deciding that they need take no cognizance of the imposition practiced upon them and the disgrace attaching to it. Was this ground for disbarring the lawyers? Give reasons briefly.

Yes.

An elector who is an attorney has the right to criticise the judgments and conduct of judges in a decent and respectful manner; but no man has a right to degrade and intimidate a public officer and bring his office into contempt by the publication of libelous matter at any time, and the fact that such officer is a candidate for re-election will not excuse such conduct. One who claims the protection of the O. Const., Art. 1, § 11, must also and at all times be held responsible for abuse of the privilege.

The real question in cases of this kind is whether under the facts admitted and proved, the respondent appears to be a fit person to be longer allowed the privilege of an attorney; whether he has shown himself, by lack of appreciation of ethical standards and by unworthy conduct, to be no longer worthy of being recognized as an officer of the court. Thatcher, in re, 80 O.S. 492.

(32)

May an attorney accept employment from an automobile club as its legal department and devote to this service only such time as is necessary, when the club advertises to its members that the legal department will advise them in reference to their legal rights in the prosecution and defense of claims or other matters pertaining to the ownership or use of automobiles, no extra charge being made for this service unless it is necessary to appear in court, draw or file claims, etc.? Explain briefly.

No.

The report of the Ohio State Bar Association for 1926

discloses the action of the committee on grievances in this matter, declaring it unethical, and an improper exploitation of the profession and derogatory of the dignity and self-respect of the profession, lowering the standards, reducing the respect of the public and bringing the profession into disrepute. A lawyer so acting for an automobile club is guilty of misconduct. See report of mid-winter meeting at p. 153.

(33)

You received $3,000 in settlement of a personal injury case. Your client is out of the city and will not return for two weeks. What would you do with the fund pending his return so as to protect him against any contingency which might arise and any casualty which may occur to you?

Notify the client if possible, and place the money in a bank for him.

Money of the client or other trust property coming into the possession of the lawyer should be reported promptly, and except with the client's knowledge and consent should not be commingled with his private property or be used by him. Canons, § 11.

(34)

The officer of a trust company calls upon you and states that the trust company contemplates carrying on a very extensive and intensive advertising campaign. That it contemplates mailing considerable advertising matter to the responsible people of the community, suggesting that the trust company be used in making conveyances, in execution of long term leases, in the administration of estates; and further stated that it desires to advise the public through the advertising that all legal matters would be referred to you. That such advertising matter would also set forth that you were capable and responsible, and that your fees would be reasonable and undoubtedly less than other members of the profession would charge for similar services. The officer of the trust company also indicated that because the trust company was forwarding the business and would incur some expense in obtaining the same, that the trust company should receive a certain commission on all business so forwarded.

What would your position be and why?

The proposition should be refused.

It is equally unprofessional to procure business by indirection through touters of any kind, whether allied real estate firms or trust companies advertising to secure the drawing of deeds or wills or offering retainers in exchange for executorships or trusteeships to be influenced by the lawyer. Canons, § 27.

Negotiable Instruments

(Numbers in parenthesis refer to answers following.)

I. REQUISITES AND VALIDITY.

A. Form. (1, 3, 6, 8, 13b, 16, 17a, 21)

Bills and Notes, 3 to 15.

See Ans. 9, Memory Work; G.C.§§ 8106 to 8120, 8231 to 8236, 8289, 8290; 45 O.S. 39; 85 O.S. 186; 23 App. 127; 20 C.C. 96.

B. Execution and Delivery. (18)

Bills and Notes, 19 to 22.

G.C.§§ 8106, 8121, 8128, 8160, 8295; 52 O.S. 64; 18 App. 185; 12 C.C.(N.S.) 37.

C. Acceptance.

Bills and Notes, 25 to 27.

G.C.§§ 8237 to 8247, 8291, 8292, 8294; 2 O. 56; 92 O.S. 406; 12 C.C.(N.S.) 353.

D. Consideration. (13a, 29, 30)

Bills and Notes, 29 to 36.

G.C.§§ 8111, 8129 to 8134, 8160; 81 O.S. 121; 6 App. 145; 16 N.P.(N.S.) 273.

II. CONSTRUCTION AND OPERATION.

A. In General; What Law Governs. (11a, 14, 25, 28)

Bills and Notes, 49 to 54.

17 O.S. 85; 25 O.S. 621; 69 O.S. 351; 85 O.S. 186; 3 O.F.D. 294.

B. Days of Grace; Maturity; on Demand. (14b, 17d)

Bills and Notes, 55 to 61.

G.C.§§ 8112, 8118, 8158, 8190, 8298.

C. Signature by Agent or Representative. (28a, 31)

Bills and Notes, 62, 63.

G.C.§§ 8124 to 8126; 72 O.S. 551; 4 D. Repr. 486.

D. Fictious Payee. (27)

Bills and Notes, 65.

G.C.§§ 8114, 8210, 8225, 8253.

III. ALTERATION, MODIFICATION. (15, 24)

Alteration of Instrument, 3 et seq; Bills and Notes, 69, 70, 107.

G.C.§§ 8118 to 8129, 8229, 8330.

IV. NEGOTIABILITY AND TRANSFER. (21, 25b, 26)

Bills and Notes, 73 to 89.

G.C.§§ 8106, 8135 to 8137, 8146 to 8155, 8295; 109 O.S. 159.

[*References are to Bates' Compact Ohio Digest.*]

V. INDORSEMENT BEFORE DELIVERY TO OR TRANSFER BY PAYEE.

Bills and Notes, 92 to 106.

G.C.§§ 8122, 8134, 8168; 77 O.S. 311.

VI. INDORSEMENT FOR TRANSFER.

A. In Blank. (4a, 11b)

Bills and Notes, 110.

G.C.§§ 8114, 8139, 8140, 8153.

B. Qualified or Without Recourse. (4c)

Bills and Notes, 111.

G.C.§§ 8143, 8170; 18 O.S. 515, 517; 5 App. 178; 23 App. 359.

C. Conditional and Restrictive Indorsements. (4d)

Bills and Notes, 112.

G.C.§§ 8141, 8142, 8144, 8152.

D. Special Indorsement. (4b, 11b)

Bills and Notes, 114.

G.C.§§ 8128, 8139, 8148.

E. Liability on Indorsement.

Bills and Notes, 119.

G.C.§§ 8169 to 8173.

F. Unauthorized, Forged or Fraudulent. (36)

Bills and Notes, 120.

G.C.§§ 8119, 8120, 8128, 8160; 29 App. 486.

VII. LIABILITY OF PARTIES; WARRANTIES. (10, 12a, 13a, 14c, 19, 36)

Bills and Notes, 121 to 125.

G.C.§§ 8165 to 8174; 36 O.S. 530.

VIII. BONA FIDE PURCHASERS; HOLDERS IN DUE COURSE.

A. Nature and Grounds of Protection. (17a, 37)

Bills and Notes, 133.

G.C.§§ 8118, 8119, 8135, 8156 to 8164, 8295; 29 O.S. 480; 36 O.S. 530; 116 O.S. 317; 5 App. 178; 17 C.C.(N.S.) 523; 249 Fed. 638.

B. Taking After Maturity. (4b)

Bills and Notes, 137.

G.C.§§ 8157, 8158.

C. What Constitutes Notice of Defect. (32)

Bills and Notes, 134 to 145.

G.C.§ 8161; 23 App. 127; 13 C.C.(N.S.) 515; 18 C.C.(N.S.) 535.

D. Consideration. (1, 30)

Bills and Notes, 147, 148.

G.C.§§ 8129 to 8134, 8157, 8295.

IX. DEFENSES AGAINST PURCHASERS OR HOLDER. (18, 24, 29, 30, 36, 37)

Bills and Notes, 39 to 41, 146, 198 to 206.

G.C.§§ 5965, 8120, 8121, 8128, 8160, 8163, 8193, 8224, 8228 to 8230, 8302, 11225-1, 13149; 19 O.S. 586; 21 C.C.(N.S.) 38.

X. PRESENTMENT, DEMAND, NOTICE, PROTEST.

A. Presentment for Acceptance.

Bills and Notes, 155.

G.C.§§ 8248 to 8256.

B. Waiver of Presentment, Protest or Notice.

Bills and Notes, 156 to 160.

G.C.§§ 8184 to 8188, 8214 to 8223, 8253, 8256, 8264.

C. Sufficiency of Presentment and Notice of Dishonor.

Bills and Notes, 161 to 167.

G.C.§§ 8176 to 8183, 8195 to 8213.

D. Necessity of Demand for Payment and Notice of Nonpayment. (7, 12b, 22, 23)

Bills and Notes, 159 to 175.

G.C.§§ 8175, 8194, 8257; 36 O.S. 530; 23 C.C.(N.S.) 71.

E. Protest and Certificate thereof. (17c)

Bills and Notes, 176 to 178.

G.C.§§ 8257 to 8265.

XI. PAYMENT AND DISCHARGE. (9, 20, 28, 33, 34, 35)

Bills and Notes, 123, 181 to 190.

See Answers 24, 25, Memory Work; G.C.§§ 8192, 8193, 8224 to 8230, 8255, 8276 to 8282; 78 O.S. 1; 85 O.S. 203.

XII. ACTIONS, PLEADINGS, EVIDENCE, BURDEN OF PROOF. (5, 7, 10, 15, 29)

Bills and Notes, 208 to 281.

G.C.§§ 8123 to 8126; 46 O.S. 265; 116 O.S. 609; 20 App. 492.

Definitions

NEGOTIABLE INSTRUMENT.—An instrument to be negotiable must conform to the following requirements:

1. It must be in writing and signed by the maker or drawer;
2. Must contain an unconditional promise or order to pay a sum certain in money;
3. Must be payable on demand, or at a fixed or determinable future time;
4. Must be payable to order or to bearer; and
5. When the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty. Throckmorton's General Code of Ohio, § 8106.

BILL OF EXCHANGE.—A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer. Throckmorton's General Code of Ohio, § 8231.

DRAFT.—An order for the payment of money, drawn by one person on another. Bouvier's Law Dictionary, Baldwin's Revision.

CHECK.—A check is a bill of exchange drawn on a bank payable on demand. Throckmorton's General Code of Ohio, § 8290.

PROMISSORY NOTE.—A negotiable promissory note is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand, or at a fixed or determinable future time, a sum certain in money to order or to bearer. When a note is drawn to the maker's own order, it is not complete until indorsed by him. Throckmorton's General Code of Ohio, § 8289.

CONSIDERATION.—Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value; and is deemed such whether the instrument is payable on demand or at a future time. Throckmorton's General Code of Ohio, § 8130.

NEGOTIATION.—An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer it is negotiated by delivery. If payable to order it is negotiated by the endorsement of the holder completed by delivery. Throckmorton's General Code of Ohio, § 8135.

HOLDER IN DUE COURSE.—See Answer 23 of Memory Work, supra.

DISCHARGE OF NEGOTIABLE INSTRUMENT.—See Answers 24 and 25 of Memory Work, supra.

OHIO STATE BAR EXAMINATIONS

QUESTIONS WITH ANSWERS

[*Arranged Chronologically.*]

(1)

Jones executed and delivered to Brown a promissory note in the following form:

$150.00

Columbus, Ohio, May 9, 1923.

For value received, on or before July 1, 1923, I promise to pay to Thomas Brown or order One Hundred and Fifty Dollars, or at his option give the holder my bay horse "Billy."

(Signed) John Jones.

Is this instrument negotiable? Give reason for answer.

Yes.

"An instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable. But the negotiable character of an instrument otherwise negotiable is not affected by a provision which:

Gives the holder an election to require something to be done in lieu of payment of money.

But nothing in this section shall validate any provision or stipulation otherwise illegal." G. C. § 8110-4.

(2)

A, as an indorsee, was the holder in due course of a negotiable promissory note for $100 which had been made and delivered by B to C. After A had obtained said note he learned that the consideration on which the note had been made and delivered by B to C had wholly failed. Thereupon, knowing that the note was valid in his hands but not wishing to enforce collection thereon against B who was a personal friend, he sold, indorsed and delivered the note to one D, a stranger to B and C, for the sum of $25.00. Before taking D's money, however, A informed D of all of the facts relating to the failure of the consideration on which said note was originally made and delivered by B to C. On the above facts, what are D's rights on said note as against B, the maker:

(a) Assuming that D took the note before maturity?
(b) Assuming that D took the note after maturity?
Give reasons for your answers.

(a) D can enforce payment on the note against B.
(b) D can enforce payment on the note against B.

Total failure of consideration is a defense against all except a bona fide holder of negotiable instruments. Slacom v. Wishart, 20 O. F. D. 231.

The fact that the payee has failed to perform the terms of the contract on his part to be performed, which amount to a consideration for the note cannot be interposed as against a bona fide holder. Rees v. Sessions, 41 O. S. 234.

A was a holder in due course and hence was not affected by any notice received afterwards, for notice in order to be operative, must be given to the holder before he pays consideration for the note. Londenback v. Lowery, 4 C. C. 65, 2 C. D. 422.

G. C. § 8163 provides "in the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable, but a holder deriving his title through a holder in due course and who is not himself a party, to any fraud or illegality, affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter."

One who acquires a note as a bona fide holder before maturity, may subsequently transfer such note with all his rights to one who is not a bona fide holder either because he purchases after maturity, or because he purchases with notice of defenses; and such holder can enforce such instrument free from all defenses except those which might have been made even as against the bona fide holder, as long as he is not one of the prior parties to such instrument as took subject to such defenses. McKesson v. Stanberry, 3 O. S. 156. Basset v. Avery, 15 O. S. 299. Sherman v. Investment Co., 19 C. C. 26, 10 C. D. 33.

"The reason why notice lets in a defense in cases on which without notice it could not be set up, is the bad faith involved in the purchase, but if a party holds a negotiable instrument discharged of defenses which may have existed between the antecedent parties, no reason is perceived why his right of sale should be any more restricted than his right to collect. The liability of the maker is then fixed; it is not increased by a subsequent sale or gift of the note to another; and it would be inconsistent that the law should recognize a perfect title in a party, and yet limit his power of disposition in the manner claimed.

Nor do we perceive the principle upon which a knowledge of the prior infirmity can be made the ground of imputing bad faith to a purchaser in no way responsible for the wrong in obtaining the paper, or putting it in circulation. Notwithstanding its former invalidity, he knows that it has now become valid. Payment alone by the maker, will discharge it, and, to him, it must be a matter of indifference, whether it be made to the holder, or his indorsee." Basset v. Avery, 15 O. S. 299 at p. 309.

The fact that D paid only ¼ of the note's face value makes no difference, since an indorsee who pays cash is a purchaser in the usual course of trade notwithstanding that he paid for the note a sum less than its fair and reasonable value. Tod v. Weck Bros. & Co., 36 O. S. 380.

(3)

(a) Define the following negotiable instruments, incorporating in the respective definitions all the essential requirements of the Negotiable Instruments Law:

(1) A negotiable bill of exchange;

(2) A negotiable promissory note.

(b) In what respects is a check distinguished from an ordinary bill of exchange?

(a) 1. "A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order, or to bearer." G. C. § 8231.

(a) 2. "Within the meaning of this chapter, a negotiable promissory note is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand, or at a fixed or determinable future time, a sum certain in money to order, or to bearer. When a note is drawn to the maker's own order, it is not complete until indorsed by him. G. C. § 8289.

(b) A check is a bill of exchange drawn on a bank, payable on demand. G. C. § 8290.

The chief difference between checks and bills of exchange are first; the Uniform Neg. Insts. Law § 188 pro-

vides that, "Where the holder of a check procures it to be accepted or certified the drawer and all indorsers are discharged from liability thereon." This is not the rule as to bills. G. C. § 8293.

Secondly; the drawer of a check is not discharged for want of presentment with due diligence or for failure to give notice of dishonor while the drawer of a bill of exchange is. The drawer of a check is only discharged by such neglect when he sustains actual damage by it, and then only pro tanto. (Norton on Bills and Notes, 4th Ed., p. 577).

Thirdly; the death of the drawer of a check rescinds the authority of the banker to pay it; while the death of a drawer of a bill of exchange does not alter the relations of the parties.

Fourthly; at common law checks unlike bills of exchange, are always payable without grace. Bouvier's Law Dictionary, Baldwin's Revision. But this distinction no longer exists because the Negotiable Instruments Law § 85, provides that: "Every negotiable instrument is payable at the time fixed therein without grace." G. C. § 8190.

(4)

With respect to the indorsement of negotiable instruments, define and state the effect of the following kinds of indorsements:

(a) A blank indorsement;
(b) A special indorsement;
(c) A qualified indorsement;
(d) A restrictive indorsement.

(a) A blank indorsement is one in which the name of the indorser only is written upon the instrument. It is commonly made by writing the name of the indorser on the back, but a writing across the face may answer the same purpose. Bouvier's Law Dictionary, Baldwin's Revision. Byles on Bills, p. 151.

"An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer, and may be negotiated by delivery." G. C. § 8139.

(b) An indorsement in full, or a special indorsement is one in which mention is made of the name of the indorsee. Chitty on Bills, p. 170.

The omission of the words "or order" is not material, for the indorsee takes it with all its incidents, including its negotiable quality. Byles on Bills—151.

"A special indorsement specifies the person to whom, or to whose order the instrument is to be payable. The indorsement of such indorsee is necessary to the further negotiation of the instrument. G. C. § 8139.

Example "Pay the contents to G. H. or order," (or other words to that effect).

(c) A qualified indorsement is one which restrains or limits, or qualifies, or enlarges the liability of the indorser, in any manner different from what the law generally imports as his true liability, deducible from the nature of the instrument. Chitty on Bills, 261.

The words commonly used are "sans recours" without recourse. "A qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words "without recourse," or any words of similar import. Such an indorsement does not impair the negotiable character of the instrument. G. C. § 8143.

Such an indorsement warrants that the prior signatures are genuine, and guarantees everything except the solvency of the prior parties. Bederman v. Bank, 5 App. 178, 25 C. C. (N. S.) 173, 27 C. D. 165.

(d) A restrictive indorsement is one which restrains the negotiability of the instrument to a particular person, or for a particular purpose.

"An indorsement is restrictive which either:

1. Prohibits the further negotiation of the instrument; or

2. Constitutes the indorsee the agent of the indorser; or

3. Vests the title in the indorsee in trust for, or to the use of some other person.

But the mere absence of words implying power to negotiate does not make an indorsement restrictive." G. C. § 8141.

Examples: 1. "Pay the contents to G. H. only;" 2. "Pay G. H. for collection;" 3. Pay G. H. as agent of H. G.," or "Pay G. H. for the use of H. G."

"A restrictive indorsement confers upon the indorsee the right:

1. To receive payment of the instrument;

2. To bring any action thereon that the indorser could bring;

3. To transfer his rights as such indorsee, when the form of the indorsement authorized him to do so.

Subsequent indorsees acquire only the title of the first indorsee under the restrictive indorsement." G. C. § 8142.

(5)

Without setting out a copy of the note, and leaving amounts and dates blank, draw a petition such as will be good against a demurrer, on a negotiable promissory note in the short form authorized by statute, in an action by the holder of the note against the maker and indorser, designating the maker and indorser defendants respectively as A and B, and assuming that the indorser was the original

payee of the note who indorsed and transferred same to plaintiff.

John Doe, Plaintiff
vs
A and B, Defendants } ss.

Court of Common Pleas

Petition.

Plaintiff states that the defendants herein are indebted to him in the sum of.....Dollars, with interest thereon at the rate of six per cent per annum from the .....day of.....19...., on a certain promissory note, of which the following is a true copy:

Hereto attached,
Exhibit A, made part hereof

Indorsement as follows:

"B" (in blank)

Plaintiff states that there are no credits on the said note.

Plaintiff further says that on the....day of.....19.., (the date of maturity of the note), said note was duly presented to said defendant A, who failed to pay the same, and that the defendant B was on said date aforesaid notified of such dishonor, and has not paid the the same nor any part thereof.

Wherefore the plaintiff prays judgment against the defendants in the sum of.....dollars, with interest thereon at the rate of six per cent per annum, from..... day of....., 19.... and for his costs herein expended.

.....
Attorney for plaintiff.

County of Franklin } ss.
State of Ohio

Comes now John Doe, of lawful age, who being duly sworn, states that he is the plaintiff in the above styled action; that he has read the foregoing petition, and that the facts setforth therein are true as he verily believes.

.....

Sworn to before me and subscribed in my presence, this.....day of....., 19....

.....
(Seal) Notary Public, Franklin Co., Ohio.

Praecipe: To the clerk: Issue summons on the foregoing petition returnable according to law. Indorse summons "Action for money only. Amount claimed..... .....Dollars, with interest and costs."

.....
Attorney for Plaintiff.

"In an action, counterclaim or set-off founded upon an account, or upon an instrument for the unconditional payment of money only, it shall be sufficient for a party to set forth a copy of the account or instrument with all credits and the indorsements thereon, and to state that there is due to him, on such account or instrument, from the adverse party, a specified sum which he claims, with interest. When others than the makers of a promissory note, or the acceptors of a bill of exchange, are parties, the facts which fix their liability, also must be stated." G. C. § 11334.

(6)

Give the necessary requirements to make an instrument negotiable.

An instrument to be negotiable must conform to the following requirements:

1—It must be in writing and signed by the maker or drawer;

2—Must contain an unconditional promise or order to pay a sum certain in money;

3—Must be payable on demand, or at a fixed or determinable future time;

4—Must be payable to order or to bearer; and

5—When the instrument is addressed to a drawee, he must be named or otherwise indicated therein, with reasonable certainty.G. C. § 8106.

(7)

John Smith delivers his note to John Jones for $1000 on June 1st, 1908, which note is due on demand. Demand on John Smith for payment of the note was not made on him until July 1923. John Jones consults you today as to whether or not he has an enforceable claim against John Smith. What would you advise, and why?

The claim is barred by the statute of limitations.

An action upon a specialty, or an agreement, contract or promise in writing shall be brought within fifteen years after the cause thereof accrued. G. C. § 11221.

The statute of limitations commences to run on a note payable on demand at the time of its delivery. Hill v. Henry, 17 O. 9; Darling v. Wooster, 9 O. S. 517; (followed in) Liggett v. Estate of Liggett, (1905) 3 N. P. (N. S.) 518, 520.

(8)

(a) What is a negotiable bill of exchange? Write one.

(b) What is a negotiable check? Write one.

(a) A negotiable bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order, or to bearer. G. C. § 8231.

The following is an ordinary form of a bill of exchange:

> $5.00 Columbus, Ohio, April 2, 19 .
>
> Thirty days after sight pay to the order of J. Smith, Five Dollars, value received, and charge to the account of
>
> Edward Drawee John Doe.
> Columbus, Ohio.

(Norton on Bills and Notes, p. 22)

(b) A negotiable check is a bill of exchange drawn on a bank payable on demand. Except as herein provided, the provisions of this division applicable to a bill of exchange payable on demand, apply to a check. G. C. § 8290.

The following is an ordinary form of a check:

> Columbus, O., April 2, .
>
> City National Bank of Columbus
> Pay to the Order of John Smith (or to J. S. or order, or to J. S. or bearer) $5.00
> Five Dollars.
>
> (signed) John Doe.

(Norton on Bills & Notes, 3rd Ed. p. 404)

(9)

Silas McAvoy informs you that on the 7th day of July, 1920, he signed as surety on the face of a note along with Peter Rabbit, the principal, and that the payee of the note without consulting him extended the time of the payment of the note. He consults you as to his liability on the note. What would you advise, and why?

Silas McAvoy is not discharged. While it is true that by G. C. § 8229 a material alteration of a negotiable instrument made by the parties to it, is ground for avoiding it as to all parties to the instrument who do not assent to such alteration, yet such section refers only to a physical alteration and not to a contract between the holder and the principal maker for an extension of time of payment of the instrument. Richards v. The Market Exchange Bank Co., 81 O. S. 348, 90 N. E. 1000

The rule of the common law that any agreement between the holder of a promissory note and the principal, which varies essentially the terms of the contract by which a surety is bound without the consent of such surety will work his release from liability, is no longer in force as to one who has signed on the face of the instrument, such rule having been in effect abrogated by G. C. § 8224. Idem.

(10)

The surety on a note was compelled to pay the same, which the principal should have paid.

When will such action by the surety against the principal for reimbursement be barred by the statute of limitations?

The action will be barred after six years from the date of the accruing of the action, which was the date upon which the surety paid the note.

An action upon a contract not in writing, express or implied, or upon liability created by statute other than a forfeiture or penalty, shall be brought within six years after the cause thereof accrued. G. C. § 11222.

(11)

(a) How are sections of the Uniform Negotiable Instruments Act to be construed so far as they may be in derogation of the common law?

(b) How can a holder convert a blank indorsement into a special indorsement?

(a) The sections of the negotiable instruments law that are in derogation of common law should be construed strictly as they are setting forth new principles, like any other statute. Miller v. Kyle, 85 O. S. 186 p. 195, 97 N. E. 232.

(b) The holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser in blank any contract consistent with character of the indorsement. G. C. § 8140.

(12)

(a) If a promissory note is given in part upon a valuable consideration and in part as a gift, what are the rights of the payee?

(b) Is an anomalous or irregular indorser entitled to notice of demand and non-payment?

(a) The payee can recover only the amount of the valuable consideration. Sharp v. Sharp, 4 App. 418.

"Absence or failure of consideration is matter of defense as against any person not a holder in due course and

partial failure of consideration is a defense pro tanto, whether failure is an ascertained or liquidated amount or otherwise. G. C. § 8133.

The gift of the sum payable in a promissory note will not support an action on the note between the payee and payor, but the payor can avail himself of the defense of want of consideration. 4 App. 418.

(b) Yes.

Under Sections 8168, 8169 and 8171 Gen. Code, the liability of an irregular indorser is the same as that of a regular indorser, and he can not be held without demand having been made upon the maker and notice of dishonor given. McGuire v. Kennedy Co., 23 C. C. (N. S.) 71, 34 C. D. 113.

Rockfield v. Bank, 77 O. S. 311, 83 N. E. 392, cited in connection with G. C. § 8169 on irregular indorsers states, that a third person placing his name on the back of a promissory note before or at the time of delivery, is, by this section, an indorser, and is accordingly discharged for want of demand and notice.

(13)

(a) What facts does an acceptor of a bill of exchange admit?

(b) Is the following instrument a negotiable instrument:

$1000.00 Columbus, Ohio, Jan. 3, 1924

This certifies that John Jones has deposited in The Guaranty Bank One Thousand dollars to the credit of himself payable in current funds to the bearer on return of this certificate on or after Feb. 1, 1924.

The Guaranty Bank by
George Miller, Cashier.

(a) By accepting the instrument, the acceptor engages that he will pay it according to the tenor of his acceptance and admits:

1. The existence of the drawer, the genuineness of the signature, and his capacity and authority to draw the instrument.

2. The existence of the payee and his then capacity to indorse. G. C. § 8167.

(b) Yes.

G. C. § 8106—an instrument to be negotiable, must conform to the following requirements:

1. Must be in writing and signed by the maker or drawer;

2. Must contain an unconditional promise or order to pay a sum certain in money;

3. Must be payable on demand, or at a fixed or determinable future time;

4. Must be payable to order or to bearer; and

5. When the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty.

A certificate of deposit issued by a banking company for $4,000 in currency, payable in like funds to the order thereon of the depositor, with interest is a negotiable promissory note, although the term currency was regarded at the time and place of the transaction as including the bank bills of sundry specie paying banks outside of the state of Ohio, as well as those of the same character within the state. Howe v. Hartness Hill & Company, 11 O. S. 449.

A certificate of deposit issued by a national bank for $1,145 payable to the order of the depositor, on the return of the certificate in current funds is in effect, a negotiable promissory note. Citizes Bank v. Brown, 45 O. S. 39, 11 N. E. 799.

(14)

$200.00 Columbus, Ohio, Feb.....1924.

Sixty days after date we promise to pay to John Brown or order three hundred dollars, value received.

Charles Gray, Syndicate Manager
of The Smith Company.
The Smith Company, John Smith, Pres.

(a) What is the amount of the principal in the foregoing promissory note?

(b) When was the note due?

(c) Who is, or are, liable thereon?

(d) From what date, if at all, will interest begin to run?

(a) Three Hundred Dollars. When the language of the instrument is ambiguous or there are omissions therein, the following rules or construction apply:

(1) When the sum payable is expressed in words and also in figures, and there is a discrepancy between the two, the sum denoted by the words is the sum payable. But if the words are ambiguous or uncertain, reference may be had to the figures to fix the amount, etc. G. C. § 8122-1.

(b) Sixty days after its issue. Where the instrument is not dated, it will be considered to be dated, as of the time it was issued. G. C. § 8122-3.

(c) Both Charles Gray and the Smith Company are liable.

Charles Gray is liable because the words following his name are merely descriptio personae. See McKisson v. Thomas, 18 C. C. (N. S.) 443, 33 C. D. 147.

The Smith Company is liable, but John Smith, the president, is not because of G. C. § 8125, providing that when the instrument contains or a person adds to his signature words indicating that he signs for, or on behalf of a principal, or in a representative capacity, he is not liable on the instrument, if he was duly authorized. But the mere addition of words describing him as an agent or as filling a representative character without disclosing his principal, does not exempt him from personal liability."

(d) From the date of its issue. When the instrument provides for the payment of interest without specifying the date from which interest is to run, the interest runs from the date of the instrument, and if the instrument is undated, from its issue. G. C. § 8122-2.

(15)

(a) Referring to the note in the foregoing question, suppose that Brown, without the consent of the maker or makers, knowingly inserted a false date, and then negotiates it to Jones, a holder in due course. What are the rights of Jones?

(b) In an action on the note, the answer is a general denial. Will the court permit the introduction of evidence of payment?

(a) Jones can enforce the note as altered against both Brown and the makers.

G. C. § 8118 provides "the insertion of a wrong date does not avoid the instrument in the hands of a subsequent holder in due course; but as to him, the date so inserted, is to be regarded as the true date."

G. C. § 8119 provides (as to an instrument filled up contrary to the authority given by the maker who delivered it incomplete), "But if such an instrument after completion is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time."

(b) No.

Payment is new matter that must be specially pleaded and cannot be raised under a general denial.

The rule is that in actions which require allegations of demand and payment, such as an action on a lease or an account, plaintiff must plead and prove such issues. In an action where demand and non-payment are not essential allegations of plaintiff's cause of action, as in an action on a promissory note, payment is an affirmative defense and must be specially pleaded and proved. Worst v. Bank and Trust Company, 11 App. 308 at p. 313.

(16)

(a) Define a negotiable instrument.
(b) A check.
(c) A bill of exchange.
(d) In the absence of any provision of the Negotiable Instrument Act to govern a matter of dispute regarding commercial paper, what law, if any, will then govern?

(a) A negotiable contract is one, the rights under which may be so transferred by the delivery or indorsement of the writing by which they are evidenced, as to enable the transferee to sue at law in his own name, and subject to no equities between prior parties. The writing by which such a contract is evidenced is called a "negotiable instrument"...The principal kinds of negotiable instruments are bills of exchange, promissory notes, and checks. Smith's Elem. Law 243. Bills & N., 8 C. J. § 4 et seq.

An instrument to be negotiable must conform to the following requirements:

1. It must be in writing and signed by the maker or drawer;
2. It must contain an unconditional promise or order to pay a sum certain in money;
3. It must be payable on demand, or at a fixed or determinable future time;
4. It must be payable to order, or bearer; and
5. When the instrument is addressed to a drawee, he must be named or indicated with reasonable certainty. G. C. § 8106.

(b) A check is a bill of exchange drawn on a bank payable on demand, except as herein otherwise provided, the provisions of this division applicable to a bill of exchange payable on demand apply to a check. G. C. § 8290.

(c) A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to order or bearer. G. C. § 8231.

(d) In any case not provided for in this division, the rules of the law merchant shall govern. G. C. § 8300.

(17)

(a) Draw a promissory note; a check; a bill of exchange.
(b) What is meant by a "holder in due course", and what conditions must exist to protect such holder, if he be a third party?
(c) What is meant by "protest" and what commer-

cial paper must it be applied to, and when and how made under the Negotiable Instruments Act of Ohio?

(d) When is an instrument payable on demand?

(a) Note.

> Columbus, Ohio, Jan. 26, 19....
> Three months after date, I promise to pay to the order of John Smith.....Five.....Dollars, value received.
> John Doe.

The following is an ordinary form of a check:

> NO. Columbus, Ohio, April 27, 19....
> City National Bank of Columbus, Ohio.
> Pay to the order of John Smith (or John Smith or order, or to John Smith or bearer.) $5.00
> Five Dollars
> (signed) John Doe.

The following is an ordinary form of a bill of exchange:

> $5.00 Columbus, Ohio, Jan. 28, 19.....
> Thirty days after sight pay to the order of John Smith five dollars, value received, and charge to account of
> Edward Drawee John Doe.
> Columbus, Ohio.

Norton on Bills and Notes, p. 34, 574, 30.

(b) One is a holder in due course who has taken the instrument under the following conditions:

1. That it is complete and regular upon its face.
2. That he became the holder of it before it was overdue, and without notice that it previously had been dishonored, if such was the fact.
3. That he took it in good faith and for value.
4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it. G. C. § 8157. See C. C. §§ 8156-8164 Inclusive.

(c) Protest is in form a solemn declaration written by a notary or other qualified individual under a fair copy of the bill, stating that acceptance or payment has been demanded and refused; the reasons for such refusal, if any, are assigned, and that the bill is therefore protested. Norton on Bills & Notes p. 368.

When a foreign bill, appearing on its face to be such is dishonored by non-acceptance, it must be duly protested for non-acceptance, and when such a bill, which has not previously been dishonored by non-acceptance is dishonored by non-payment, it must be duly protested for non-payment. If it is not so protested, the drawer and indorsers are discharged. When a bill does not appear on its face to be a foreign bill, protest thereof in case of dishonor is unnecessary. G. C. § 8257.

When a bill is protested, such protest must be made on the day of its dishonor, unless delay is excused as herein provided. When a bill has been duly noted, the protest may be subsequently extended as of the date of noting. G. C. § 8260.

The protest must be annexed to the bill, or contain a copy of it, must be under the hand and seal of the notary making it, and must specify:

1. The time and place of presentment;

2. The fact that presentment was made, and the manner thereof;

3. The cause or reason for protesting the bill;

4. The demand made and the answer given, if any, or the fact that the drawer or acceptor could not be found. G. C. § 8258.

(d) An instrument is payable on demand:

1. When it is expressed to be payable on demand, or at sight, or on presentation; or

2. In which no time for payment is expressed. When an instrument is issued, accepted, or indorsed, when overdue, it is, as regards the person so issuing, accepting or indorsing it, payable on demand. G. C. § 8112.

(18)

Jones was indebted to Smith, and wrote Smith a letter which was received by Smith June 20, 1923, in which he stated:

"I will give you my note for the amount due, June 22, 1923."..On June 22, 1923, Smith went into Jones' office and saw a note made payable to him for the amount of his claim and signed by Jones, lying on Jones' desk. Jones not being in the office, Smith took the note and put it in his pocket and went away. Later in the day, he learned that Jones died on the night of June 21, 1923. Smith presented the note to the administrator of Jones' estate, who refused payment thereon. Smith brought suit thereon. What defense, if any, could the administrator make against said note?

The defense of no delivery.

Every contract on a negotiable instrument is incomplete

and revocable until delivery of the instrument for the purpose of giving effect to it. As between immediate parties, and as regards a remote party, other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting, or endorsing, as the case may be. In such case, the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument. But when the instrument is in the hands of a holder in due course, a valid delivery of it by all parties prior to him so as to make them liable to him is conclusively presumed. And when the instrument is no longer in the possession of a party whose signature appears thereon a valid and intentional delivery by him is presumed until the contrary is proved. G. C. § 8121.

Where a note was found, after the death of the payee, among the papers of the payee, with an endorsement to the plaintiff written thereon by said payee, and was delivered by the administrator of the payee to the plaintiff, this does not transfer the note to the plaintiff so that he can recover on it as endorsee, since there was no valid delivery by the payee. John Clark v. John Boyd, 2 O. 56.

(19)

Brown was owing Clark $125 on an open account, and Brown gave Clark his promissory note for the sum of $125 payable one year after date, but upon the maturity, failed to pay the same and never did pay the same. Ten years later, Brown held a public sale of all his chattel property and Clark bid in cows to the value of $125 and took the cows home. On time for settlement, he proffered Brown's note for $125 in payment for the cows and Brown refused to accept the same in payment and sued Clark to recover the value of the cows purchased.

Can Brown recover? Give reasons.

Brown cannot recover.

An action upon a specialty or an agreement, contract or promise in writing shall be brought within fifteen years after the cause thereof accrued. G. C. § 11221.

Hence the limitation had not yet run on the note given by Brown to Clark and Clark may therefore set it off against the debt which he owes Brown.

A set-off is a cause of action existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action, and arising on contract or ascertained by the decision of a court. It can be pleaded only in an action founded on contract. G. C. § 11319.

(20)

A sold B a bill of goods. B immediately sent him a check in payment for the same. This check was a check sent to B by another party and endorsed by B to the order of A. A accepted said check and sent B a receipted bill for his account. The check was returned to A not paid for want of funds. A asked B to make the check good, which B refused to do, and thereupon A sent B another bill for the goods purchased, requesting payment of the same. B claimed he had paid for the same, and upon suit presented his receipted bill.

Could A recover from B?

A could recover from B since there was no estoppel.

As a general rule, giving a note is not payment, but merely evidence of payment of the debt, and in the absence of proof to the contrary must be so regarded.

The giving of an order, check, or other paper in payment of a debt, and its acceptance in due course of business, DOES NOT CONSTITUTE ABSOLUTE PAYMENT IN THE EVENT THE PAPER PROVES WORTHLESS, unless it clearly appears that the paper was accepted in satisfaction and without regard to its proving to be of the value for which it is accepted; and the burden is on the party making the payment to show that it was thus accepted. Weller Co. v. Gordon, 70 O. S. 489, 72 N. E., 1160, Aff. 7 C. C. (N. S.) 303, 14 C. D. 407.

(21)

(a) Give the difference, if any, between a Certificate of Deposit and a Promissory Note.

(b) Is a Certificate of Deposit negotiable?

(c) Is a savings bank Pass Book negotiable?

(d) Is a postoffice Money Order negotiable?

Reasons for answers.

(a) A promissory note is an unconditional promise to pay a certain sum of money absolutely, and these essential elements, a debt of a definite sum and a promise to pay, are present in a certificate of deposit, and for this reason it is deemed in effect a promissory note. A promissory note ordinarily represents a loan or its equivalent, and it is generally the duty of the debtor to seek the creditor and pay him, and it was for the protection of the debtor that demand notes were originally held to be due at once. Deposits are made in a bank in accordance with the universal commercial usage, which becomes a part of the law of the transaction. They are neither loans, nor bailments in the strict sense of the term. 3 R.C.L.§ 202, p. 573.

(b) Yes.

As a general rule, certificates of deposit are regarded as

having the attribute of negotiability, although there is some authority for the contrary view. 7 C.J., p. 648, § 340, citing, Cit. Nat. Bank v. Brown, 45 O.S. 39, 11 N.E. 739; Howe v. Hartness, 11 O.S. 449.

(c) No.

A pass book is not negotiable, etc., * * *. 7 C.J., p. 639, § 320.

(d) No.

More than one indorsement of a money order renders the same invalid and not payable. U. S. code, title 39, C. 19, p. 1305, § 723.

A money order is not a negotiable instrument, and it has been decided that if the issue of one has been fraudulently procured, the government may, after paying it, recover the money, even from a person who under the law merchant would be a bona fide holder for value. 21 R.C.L., p. 742, § 14.

(22)

$200.00 Columbus, Ohio, January 1, 1926.

Sixty days after date, for value received, we jointly and severally promise to pay William Watson, Columbus, Ohio, or order, Two Hundred Dollars, with interest from date at the rate of seven per cent until paid.

(Signed) Charles Robinson,
Grace Robinson.

On back of note is following endorsement:

I hereby guarantee the payment of the within note to William Watson. (Signed) John Jackson.

What are the necessary steps to be taken by William Watson before John Jackson is liable as guarantor?

1. Presentment to Charles Robinson and Grace Robinson for payment at maturity of note. G.C.§ 8175.

2. Notice of dishonor should be given to John Jackson. G.C.§ 8194. Bashford v. Shaw, 4 O.S. 263.

A guarantor is entitled to notice within a reasonable time after the note is dishonored. Dunbar v. Brown, 2 O.F.D. 460.

(23)

A, the payee, endorsed a promissory note to B. The endorser A was fully indemnified to secure payment of this note. Can B maintain the action against A without proof of demand and notice upon the maker? Give reasons.

Yes.

Where an indorser is indemnified by property of the maker in his possession, at the time the note falls due, demand and notice is not necessary. Kyle v. Green, 14 O. 495; Develing v. Ferris, 18 O. 170; 1 Parsons on Bills and Notes, §§ 567 et seq.; Beard v. Westerman, 32 O.S. 29, 30.

The reason upon which the decision in these cases is based is, that the indorser, having anticipated the possibility

of liability, and having secured himself against loss in consequence of such liability, would be placed in no better situation by demand and notice. And when the demand and notice could be of no advantage to him, it would seem to be unreasonable to require that such demand should be made and notice given. Develing v. Ferris, 18 O. 170, 180.

(24)

Smith executed a note, payable generally with Brown as an accommodation endorser; later Smith in the absence of Brown inserted a particular place of payment into the note and discounted it to the Cleveland Trust Co. Can the Cleveland Trust Co. recover the amount of the note from the endorser? Give reasons.

No.

When a note, payable generally, is made and indorsed in blank for the accommodation of the maker, and at the time of its discount is altered without the knowledge or consent of the indorser, by the interlineation of a particular place of payment, such alteration is material and discharges the indorser. Sturges & Hale v. Williams, 9 O.S. 444.

(25)

(a) Are stipulations inserted in a promissory note that the maker will pay the attorney fees for the collection of the note if the principal and interest are not paid at maturity, valid?

(b) What is the effect, if any, of such stipulations on the negotiability or validity of the instrument?

(a) No.

It is the settled law of this state that stipulations incorporated in promissory notes for the payment of attorney fees, if the principal and interest be not paid at maturity, are contrary to public policy and void. Miller v. Kyle, 85 O.S. 186, 97 N.E. 372.

(b) G.C.§§ 8106, 8107 do not give validity to such stipulations but provide only that they shall not destroy the negotiable character of instruments in which they are incorporated. Supra.

(26)

A cognovit promissory note with the customary power of attorney to confess judgment attached to it, is endorsed in blank and placed in the hands of a third party:

(a) Is the negotiability of the note affected by the power of attorney to confess judgment?

(b) Does the power of attorney remain valid after the transfer?

(a) No.

(b) No.

A power of attorney to confess judgment, attached to a note, and forming a part of the same instrument, does not destroy the negotiability of the note. Such power of attorney is not negotiable, and when the note is transferred becomes invalid and inoperative. Osborn v. Hawley, 19 O. 130; McClure v. Bowles, 5 N.P. 327, 5 D. 288; see also, Nat. Bank v. Jerko, 25 N.P.(N.S.) 453.

An instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable. But the negotiable character of an instrument otherwise negotiable is not affected by a provision which: * * * * * *

2. Authorizes a confession of judgment if the instrument be not paid at maturity; or * * *. G.C.§ 8110.

(27)

(a) H made a note payable to J. W., believing that J. W. was a real person, when in fact J. W. was a fictitious person. B using and signing the name of J. W. assigned the note before its maturity to himself. H refused payment after maturity and upon demand. Can B recover on said note? Give reason.

(b) H made a note payable to W. J.—W. J. was not the name of any person and H knew that W. J. was not the name of any person but was a name used by D for certain purposes. D indorsed the note before maturity to himself, using and signing the name W. J. Upon demand after maturity H refused payment. Can D recover on said note? Give reason.

(a) No.

A promissory note made payable to the order of a fictitious and non-existing person, when such fact was unknown at the time to the maker of the note, is void. Houston v. Hettlinger, 23 N.P.(N.S.) 405, citing Armstrong v. Bank, 46 O.S. 612.

The transaction partakes of fraud and no title passed. Supra, p. 408.

(b) Yes, the note was payable to bearer.

G.C.§ 8113, provides: The instrument is payable to bearer;

* * *

3. When it is payable to the order of a fictitious or nonexisting person, and such fact was known to the person making it so payable; or

4. When the name of the payee does not purport to be the name of any person; * * *.

(28)

(a) "$500.00 November 26, 1926.

Two months after date I promise to pay to the Great

American Printing Company or order Five Hundred Dollars.

Value received. At their office.

(Signed) H. H. Wood,
For Critic Publ. & Prtg. Co."

The Great American Printing Company is attempting to recover from H. H. Wood. Wood urges that he is not the maker of the note and should not be held personally liable thereon. Is he personally liable? Why?

(b) If there is a conflict between the written and printed provisions of the instrument, which provision prevails?

(c) When an instrument provides for the payment of interest without specifying the date from which interest is to run, from what date does the interest run?

(a) Yes.

We quote the opinion of a similar case as follows:

The cases holding that commercial paper signed by one as agent, and as agent of particular persons, is the personal obligation of him who signed the paper are decidedly in point. It is urged that it cannot be claimed that the words following the signature on the notes are simply a description of the person; but we think that the notes in this case are clearly written promises on the part of Wylie for the payment of the money. It is true he says that he promises to pay for this publishing and printing company, but it is clearly he who promises to pay. Suppose these notes read I, H. H. Wylie, promise to pay for the Critic Publishing and Printing Company. Could there be any doubt that it would be the promise of Wylie, which he is bound to make good? We think not. And we think the language used in the notes sued upon is equally clear that Wylie promised to pay for the company. Wylie v. Paper Co., 24 C.C. (N.S.) 143, 34 C.D. 526.

(b) The written.

When the language of the instrument is ambiguous or there are omissions therein, the following rules of construction apply:

*** * ***

4. When there is a conflict between the written and printed provisions of the instrument, the written provisions prevail. G.C.§ 8122.

(c) From the date of the instrument.

Where an instrument is payable at a future day, with interest, and nothing is said therein as to the commencement of the interest period, interest is computed from the date of the instrument. Carr v. Sav. & Loan Co., 112 O.S. 219, 228, 147 N.E. 641; citing, Perley on Interest, p. 8; 15 R.C.L., p. 25.

When the language of the instrument is ambiguous or

there are omissions therein, the following rules of construction apply:

*** * ***

2. When the instrument provides for the payment of interest without specifying the date from which interest is to run, the interest runs from the date of the instrument, and if the instrument is undated, from its issue * * *. G.C.§ 8122.

(29)

On March 1, 1927, A executed and delivered to B his promissory note in the sum of $5,000 payable to B or order on demand. At the time of the delivery A and B made an oral agreement that B was to procure a purchaser for A's store building at a price of $50,000 within ten days, and that if he did not procure such purchaser that the note was to be returned to A. B failed to procure a purchaser in the specified time. He did not return the note but sued A to collect it. A attempted to testify in court as to the oral agreement. B's attorney objected on the ground that A was attempting to dispute the terms of a written instrument with oral testimony. The court sustained the objection. Was the court right? Give reasons.

No.

G.C.§ 8121 provides in part: * * * As between immediate parties, and as regards a remote party, other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting or endorsing, as the case may be. In such case, the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument * * *.

Under the provisions of G.C.§ 8121 parol evidence may be received to show that the delivery of a promissory note was conditional, and that the note was not to become operative except upon the happening of a certain event. Shive v. Merville, 1 App. 33, 15 C.C.(N.S.) 535, app. in Roberts v. Exch. Bank, 18 App. 185, 190.

(30)

John Doe, of Oberlin, Ohio, signed the following paper:

"S. Publishing Co., Dec. 8, 1926.
Cleveland, Ohio.

Gentlemen: Please enter my subscription to five magazines for three years, for which I promise to pay to your order $24 six months after date. John Doe,
Oberlin, Ohio."

On January 10, 1927, the S. Publishing Co. sold this subscription note to the First National Bank of Oberlin. On the back of the note was the following endorsement:

"Pay to the order of the First National Bank of Oberlin, Ohio. S. Publishing Co., by John Stevens, President."

John Doe received no magazines and refused to pay the note when due. The Bank knew nothing about this until the note was presented to John Doe for payment. Can Doe be compelled to pay the amount of this note to the Oberlin Bank? Explain answer.

Yes. The Oberlin bank is a bona fide holder.

Absence or failure of consideration is matter of defense as against any person not a holder in due course, * * *. G.C.§ 8133.

Failure of consideration is not a defense against the bona fide holder of a negotiable instrument. Pease v. McClelland, 4 O.F.D. 82; Slacom v. Wishart, 2 O.F.D. 331; Loffland v. Russell, W. 438.

(31)

The directors of the Clark Grocery Co. authorized the secretary, John Jackson, to borrow $10,000 from the City Natl. Bank. Jackson borrowed the money and executed the note:

"Cleveland, Ohio, May 1, 1927.

Thirty days after date the Clark Grocery Company promises to pay to the City National Bank, or order, ten thousand dollars, for value received, with interest at six per cent per annum payable semi-annually. (Signed) John Jackson, Secy. of the Clark Grocery Company."

The Clark Grocery Co. is insolvent. The Bank attempts to collect this note from Jackson individually. Will it be able to do so? Give reasons.

No.

When the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized * * *. G.C.§ 8125.

(32)

John Smith held the promissory note of Roy Harper for $1,000 dated Jan. 1, 1927, due 90 days after date. On Jan. 15, 1927, John Smith sold this note to Geo. Ladd for $700 and delivered the note to Ladd, but failed to endorse it. A few days after Ladd bought the note, he learned for the first time that the note was given for an automobile which Smith sold to Harper, which automobile was defective and proved worthless, and that Harper said he'd never pay the note. A few days after getting this information Ladd discovered that Smith had failed to endorse the note. He took the note back to Smith and had him endorse it. Is Ladd a holder in due course of this note? Explain.

No.

When the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferer had therein and the transferee acquires in addition the right to have the indorsement of the transferer. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made. G.C.§ 8154.

Ladd knew about the failure of consideration when the indorsement was actually made, and hence is not a holder in due course within the purview of the above section.

(33)

A is maker of a note payable to the order of B and C, who are not partners and neither has authority to act for the other. The day before the maturity of the note, A paid the full amount of the note to C on C's promise to pay B his share and have B endorse the note and surrender it to A the next day. Instead, C keeps all the money and on the back of the note assigns his part interest to D for value before maturity, and delivers the note to D. Neither D or B have any knowledge of the payment to C, and as plaintiffs sue A on the note.

How does the lawsuit result?

Give brief reasons for answer.

D and B can both recover from A.

It is the duty of the maker of a negotiable instrument when he pays it before maturity to cancel or destroy it. If he neglects to do so, and it is payable to bearer, or bears a genuine indorsement in blank or to bearer, and is transferred to a party who takes it before maturity, for a valuable consideration, in the usual course of trade, without knowledge that it had been paid, such payment is no defense in a suit upon it by the transferee. Allen v. Johnson, 20 C.C. 8.

(34)

A and B execute a joint and several note, both signing on face thereof, but B being in fact a surety. The holder of the note, with knowledge of this fact, at maturity of note extends time of payment for a valuable consideration. Can holder of note hold B liable on the note when extended time has expired—

(a) Under Code?

(b) At common law?

(a) Yes.

(b) No.

One who signs a promissory note on the face thereof, and who, in that way becomes a surety for the principal maker, is, by force of R.S.§ 3178a (now G.C.§ 8296) primarily liable for the payment of such note. R.S.§ 3175j (now

G.C.§ 8224) relating to the discharge of negotiable instruments, provides in what manner, and for what causes, such instruments may be discharged, and, by force of the rule expressio unius est exclusio alterius, sureties upon such instruments who are primarily liable thereon cannot be otherwise relieved from responsibility from their payment. The rule of the common law that any agreement between the holder of a promissory note and the principal, which varies essentially the terms of the contract by which a surety is bound without the consent of such surety will work his release from liability, is no longer in force as to one who has signed on the face of the instrument, such rule having been abrogated in effect by R.S.§ 3175j (now G.C.§ 8224).. R.S.§§ 3175o, 3175p (now G.C.§§ 8229, 8230) relating to the alteration of instruments, apply to the physical alteration of the instrument itself, but do not apply to a contract between the holder and the principal maker for an extension of time of payment of the instrument. Richards v. Market Exch. Bank, 81 O.S. 348, 90 N.E. 1000.

(35)

A signs as accommodation endorser on a note for $1,000 given by B to C. B deposits stock of the U. S. Steel Corporation worth $800 as collateral to secure the payment of the note with C. C without the knowledge or consent of A releases the collateral to B. To what extent, if any, is A discharged?

A is discharged to the extent of the $800 released by C. G.C.§ 8300 provides: "In any case not provided for in this division, the rules of the law merchant shall govern."

Under favor of G.C.§ 8300 and the rules of the law merchant an accommodation endorser is entitled to be protected in his right to collateral securities deposited with the payee, and such payee has no right to divert the securities without the consent of such endorser, and an endorser will be released by such act to the extent he is injured thereby. Frazier v. First Nat. Bank of Elwood, 2 App. 159, 20 C.C.(N.S.) 562, 24 C.D. 508.

It is a well settled rule in equity, that where a creditor holds property in pledge as security for debt, and has in addition individual security who is without indemnity, he will be compelled to exhaust his lien, and convert the pledged property, before he resorts to the individual, and can only call on the individual, either to pay and be subrogated to the security, or to make up the deficiency after the pledged property is exhausted. It has been held that if a creditor, by any act of his, impair the security of those collaterally bound to him, he thereby discharges them, either altogether, or for so much as has been lost, to the security. The same principle is decided in Stump v. Rogers, 1 O. 533; Cass v.

Adams, 3 O. 223, and in 3 O. 260; Downer v. Bank, W. 477, 480.

(36)

A check was made by Brown payable to Jones. Smith stole it, forged Jones' name and the bank paid him on it. Jones then sued the bank as acceptor of a draft. The defendant set up that Brown had no account with it. Can Jones recover?

No.

A check does not of itself operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts or certifies the check. G.C.§ 8294.

By force of the provisions of G.C.§ 8294 there is no liability on the part of a bank to the holder of a check unless and until it accepts or certifies the check. Where a check is paid by a bank, which is the drawee thereof, on a forged indorsement, and there is stamped upon the check "Paid," together with the date of the payment and the name of the bank, and the check is charged to the account of the drawer, this is not an acceptance of the check within the meaning of G.C.§ 8294 and does not create a liability against the bank in favor of the true holder or payee. Elyria Sav. & Bank. Co. v. Walker Bin Co., 92 O.S. 406, 111 N.E. 147.

(37)

Which of the following defenses can be set up against a holder in due course—Forgery; Agreement not to sue; Failure of consideration; Alteration; Theft of incomplete instrument before delivery; Agent exceeded authority in filling out note; Voidity by statute?

1. Forgery;
2. Theft of incomplete instrument before delivery;
3. Agent exceeded authority in filling out note;
4. Voidity by statute.

When a signature is forged or made without authority of the person whose signature it purports to be, it is wholly inoperative. No right to retain the instrument, give a discharge therefor, or to enforce its payment against any party thereto, can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority. G.C.§ 8128.

A bona fide holder acquires a negotiable instrument free from all defenses, except those which go to the execution of the instrument. McKesson v. Stanberry, 3 O.S. 156; Johnson v. Way, 27 O.S. 374; Fossitt v. Bell, 2 O.F.D. 563; see also, Brannan's Negotiable Instrument Law, p. 256.

Consequently an agreement not to sue is no defense against a bona fide holder.

Absence or failure of consideration is matter of defense as against any person not a holder in due course and partial failure of consideration is a defense pro tanto, whether the failure is an ascertained and liquidated amount or otherwise. G.C.§ 8133.

When a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized or assented to the alteration, and subsequent indorsers. But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor. G.C.§ 8229.

Where a note has been materially altered by one of the makers before its delivery to a holder in due course not a party to the alteration and having no knowledge that it has been so altered after signature of the makers, the holder in due course may enforce payment thereof according to its original tenor. Dick v. Hyer, 94 O.S. 351.

When an incomplete instrument has not been delivered it will not, if completed and negotiated, without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery. G.C.§ 8120.

A signature by procuration operates as notice that the agent has but a limited authority to sign, and the principal is bound only in case the agent in so signing acted within the actual limits of his authority. G.C.§ 8126.

All promises, agreements, notes, bills, bonds, or other contracts, * * * when the whole, or any part of the consideration of such promise, * * * is for money, * * * won or lost, * * * upon any game, * * * whatsoever, * * * shall be absolutely void, and of no effect. G.C.§ 5965 (R.S.§ 4269).

The indorsee of a check given for money lost at a game of cards cannot recover upon it aganst the drawer, though a bona fide holder for value without notice of the vice in the consideration. A check so drawn is within the provisions of R.S.§ 4269, and absolutely void and of no effect. Lagonda Nat. Bank v. Portner, 46 O.S. 381; see also, Spring Valley Bank v. Somers, 9 N.P.(NS.) 481.

Partnership

(Numbers in parenthesis refer to answers following.)

I. THE RELATION.

A. Creation, Capacity and Tests of Partnership. (3, 7, 26, 31, 36)

Partnership, 1 to 14.

7 O.S. 172; 28 O.S. 319; 115 O.S. 405; 21 App. 44; 26 App. 177; 4 C.C. 195; 14 O.F.D. 294; 23 N.P.(N.S.) 519; 25 N.P.(N.S.) 225.

B. Estoppel by Holding Out as Partner. (1, 37)

Partnership, 17, 22.

36 O.S. 135.

C. Partnership Distinguished from Tenancy in Common and Joint Venture. (18)

Partnership, 2.

12 O.S. 178; 24 O.S. 598; 28 O.S. 319; 36 O.S. 139; 91 O.S. 210; 21 C.C. 527.

II. FIRM NAME AND ENTITY. (19)

Partnership, 30, 31.

G.C.§§ 8099 to 8105, 11260; 47 O.S. 309, 313; 61 O.S. 392; 91 O.S. 210; 10 L.R. 571.

III. FIRM PROPERTY AND BUSINESS.

A. What is Firm Property.

Good Will, 1 et seq; Partnership, 32.

29 O.S. 22; 39 O.S. 429; 50 O.S. 115; 2 N.P.(N.S.) 133.

B. Partnership Real Estate; When Considered Personal Property. (9)

Partnership, 33, 34.

4 O.S. 1; 29 O.S. 22, 52; 38 O.S. 339; 15 App. 134; 22 C.C. (N.S.) 44.

C. Services and Compensation. (28)

Partnership, 38.

26 O.S. 190; 18 C.C. 871; 12 B. 78.

D. Firm Assuming Debts of Partner.

Partnership, 39.

30 O.S. 389; 21 App. 118.

E. Misappropriation of Firm Property or Funds. (12, 34)

Partnership, 43.

25 O.S. 180; 28 O.S. 55; 103 O.S. 328; 6 O.F.D. 279.

[*References are to Bates' Compact Ohio Digest.*]

IV. ACTIONS BETWEEN PARTNERS. (29, 34)

Partnership, 52.

16 O.S. 552; 26 O.S. 567; 29 O.S. 120; 47 O.S. 320; 54 O.S. 214; 60 O.S. 1.

V. POWERS OF PARTNERS.

A. Restrictions of Partner's Authority. (13)

Partnership, 62, 81.

14 O. 601; 8 App. 303; 21 C.C. 260; 1 C.D. 584; 13 D. 938.

B. Scope of Firm Business. (4, 33)

Partnership, 63.

W. 420; 11 O.S. 29; 16 O.S. 75; 29 O.S. 124; 41 O.S. 64.

C. Borrowing and Loaning Money. (4, 11, 33)

Partnership, 64. 65.

25 O.S. 667; 32 O.S. 374; 38 O.S. 339; 39 O.S. 19; 41 O.S. 64.

D. Disposition of Firm Property. (4)

Partnership, 67.

24 O.S. 209; 28 O.S. 55; 57 O.S. 385; 103 O.S. 328.

E. Mortgages or Pledges; Negotiable Instruments. (4, 6, 11, 30, 33)

Partnership, 68 to 73.

14 O. 592; 20 O.S. 281; 40 O.S. 464; 55 O.S. 446; 57 O.S. 385.

F. Contracts in General, Trading and Nontrading Firms. (12)

Partnership, 74.

2 O.S. 478; 15 O.S. 75; 53 O.S. 434; 55 O.S. 446; 4 O.F.D. 213.

G. Guaranty or Suretyship. (4)

Partnership, 75.

2 O.S. 478; 32 O.S. 374; 33 O.S. 7; 2 D. 153.

H. Assignment for Benefit of Creditors. (4)

Partnership, 78.

29 O.S. 441; 55 O.S. 183; 7 N.P. 446.

VI. FIRM LIABILITY, TORTS AND CONTRACTS. (21, 25, 33, 38)

Partnership, 82, 86 to 90.

G.C.§ 10733; 30 O.S. 374; 40 O.S. 313; 41 O.S. 100; 42 O.S. 302; 56 O.S. 351; 95 O.S. 42; 2 C.C. 453.

VII. APPLICATION OF FIRM ASSETS TO LIABILITIES. (10)

Partnership, 93, 94.

G.C.§ 11260; 7 O.S. 179; 25 O.S. 609; 43 O.S. 38; 55 O.S. 446.

VIII. TRANSACTIONS BY OR BETWEEN PARTNERS AFFECTING RIGHTS OF CREDITORS.

Partnership, 95 to 98.

G.C.§§ 11092, 11093, 11104, 11105; 11 O. 394; 5 O.S. 508; 14 O.S. 464; 23 O.S. 468; 30 O.S. 389; 107 O.S. 228.

IX. ASSETS OF INDIVIDUAL PARTNERS, RIGHTS OF INDIVIDUAL OR FIRM CREDITORS. (2, 8, 13, 17, 27, 35)

Partnership, 99 to 101.

G.C.§§ 11664, 13142; 7 O. 130; 25 O.S. 609; 117 O.S. 247; 5 N.P. 52.

X. ACTIONS BY OR AGAINST FIRM OR PARTNERS. (2, 10, 12)

Partnership, 104 to 143.

G.C.§§ 11260, 11495, 11651, 11664, 13142; 3 O.S. 358; 39 O.S. 57; 56 O.S. 754; ~~117 O.S. 247~~; 18 C.C.(N.S.) 522; ~~20 N.P. (N.S.) 510~~.

XI. RETIREMENT AND ADMISSION OF PARTNERS. (1, 15, 23, 30, 39)

Partnership, 146 to 151.

57 O.S. 385; 21 App. 118; 4 O.F.D. 493.

XII. DISSOLUTION, SETTLEMENT AND ACCOUNTING.

A. Causes of Dissolution, by Operation of Law, by Act of Parties. (14, 16, 22, 23)

Partnership, 167 to 173.

G.C.§ 8051; ~~57 O.S.~~ 385; 21 App. 528; 8 N.P. 612; 14 D. 651.

B. Rights and Liabilities After Dissolution; Surviving Partner. (5, 10, 20)

Partnership, 154 to 164, 176 to 186.

G.C.§§ 8079, 8098, 10733; ~~30 O.S. 389~~; ~~34 O.S. 187~~; 38 O.S. 401; 54 O.S. 86; 55 O.S. 138; ~~50 O.S. 115~~; 21 App. 283.

C. Distribution and Settlement Between Partners or Their Representatives. (5, 32)

Partnership, 189 to 201.

15 O.S. 399; ~~26 O.S. 190~~; 38 O.S. 357; 113 O.S. 543; 22 App. 209.

D. Actions for Dissolution and Accounting. (22, 32)

Partnership, 204 to 213.

G.C.§ 11227; ~~44 O.S. 69~~; ~~46 O.S. 652~~; 59 ~~O.S.~~ 60; 12 ~~App.~~ 471.

XIII. LIMITED PARTNERSHIP, PARTNERSHIP ASSOCIATIONS. (13, 24)

Partnership, 216 to 218.

G.C.§§ 8036 to 8078.

Definitions

PARTNERSHIP.—A relation founded upon a contract between two or more persons to do business as individuals on joint, undivided account. A contract of two or more competent persons to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, and to divide the profit and bear the loss in certain proportions. Bouvier's Law Dictionary, Baldwin's Revision.

LIMITED PARTNERSHIP.—A form of partnership created by statute in many of the United States, wherein the liability of certain special partners, who contribute a specific amount of capital, is limited to the amount so contributed, while the general partners are jointly and severally responsible as in ordinary partnership. All the partners are liable as general partners, unless the statutes upon the subject are strictly, or as some cases say, substantially complied with. Bouvier's Law Dictionary, Baldwin's Revision.

GOOD WILL.—The benefit which arises from the establishment of particular trades or occupations. The advantage or benefit which is acquired by an establishment, beyond the mere value of the capital, stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position, or common celebrity, or reputation for skill or affluence or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities, or prejudices. Bouvier's Law Dictionary, Baldwin's Revision.

DISSOLUTION.—The dissolution of a partnership is the putting an end to the partnership. Its dissolution does not affect contracts made between the partners and others; so that they are entitled to all their rights, and are liable on their obligations, as if the partnership had not been dissolved. Bouvier's Law Dictionary, Baldwin's Revision.

FICTITIOUS NAMES.—Except as otherwise provided in the next following section, every partnership transacting business in this state under a fictitious name, or a designation not showing the names of the persons interested as partners therein, must file with the clerk of the common pleas court of the county in which its principal office or place of business is situated, a certificate to be indexed by him, stating the names in full of all the members of the partnership and their places of residence. Throckmorton's General Code of Ohio, § 8099.

OHIO STATE BAR EXAMINATIONS

QUESTIONS WITH ANSWERS

[*Arranged Chronologically.*]

(1)

Smith, Jones & Co. conducted a grocery store. Smith sells his interest to Jones and consents to the business being carried on as heretofore, under the name of Smith, Jones & Co., and B, a wholesale grocer, sells goods on credit to the concern, without any knowledge of the sale of Smith's interest.

Can B hold Smith for the debt?

Yes.

A copartnership, consisting of a father and son, carried on business under the firm name of H. S. & Co. H. S., the father, who was a man of means, and gave the firm its credit, sold his interest in the firm to his partner and another son, who, by agreement with the father, continued the business as theretofore in the firm name of H. S. & Co. In an action by a creditor who had trusted the new firm on the faith that the father was a member: Held, That the father, by allowing his name to be so used, held himself out as a member of the new firm, and was thereby estopped from denying the fact, although publication had been made of the

dissolution of the old and the formation of the new firm, of which the creditor had, in fact, no notice. Speer v. Bishop, 24 O.S. 598.

(2)

A and B, partners, engaged in a retail drygoods business in this state under the name of the B—Dry Goods Company, purchased on credit a large bill of goods from one C a wholesale drygoods merchant. The bill not being paid when due, C brought suit against said partnership in the firm name, and in due time after proper service on the partnership, obtained judgment against the partnership in its firm name aforesaid and caused an execution to be levied on the property of said partnership. The property and assets of the partnership so levied on being apparently and obviously insufficient to satisfy C's judgment, he caused said execution to be levied on certain real property owned by A individually, no individual personal property of A being found on which said levy could be made. Within a month thereafter, A sold and conveyed said real property to one D who at the time had actual knowledge that the execution on C's judgment aforesaid had been levied on the property purchased by him. Thereafter D brought an action in a court of competent jurisdiction to quiet his title to said property as against the levy on the property claimed by C by virtue of said execution. Assuming that all proper parties are before the court, what should be the court's decree?

Give reasons for your answer.

The court should render a decree quieting D's title.

The Code provides that a partnership formed for the purpose of carrying on a trade or business in this state, or holding property therein, may sue or be sued by the usual or ordinary name which it has assumed, or by which it is known. In such case, it shall not be necessary to allege or prove the names of its individual members. G. C. § 11260.

The judgment was not rendered against the partners individually and did not operate as a lien on their individual property. G. C. § 11664 provides "an execution on a judgment rendered against a partnership firm by its firm name shall operate only on the partnership property. The exact amount of the debt, damages and costs for which the judgment is entered, shall be endorsed on the execution."

(3)

State fully the different tests applied by the courts in determining whether or not persons associated in a business enterprise are partners.

(1) Mutual agency test, or sharing profits as principals;

(2) Test of intention of the parties, as derived from their contract;

(3) Sharing the profits and losses test.

(4) Community of interest test.

(1) In order to determine whether a partnership exists, we apply the test in Ohio as to whether there is a joint business carried on by two or more, with the relationship of principal and agent for one another, and whether there is a sharing of net profits. Of course as to the partners themselves, the contract between them will control. As to third persons, this partnership relation may be created by estoppel; that is to say even though the elements of a partnership do not exist, and there is no agreement between parties to be partners, and their acts and doings in view of the above presumed facts have led one to rely on such partnership relation, they are of course precluded from denying its existence. Harvey v. Childs, 28 O. S. 319, Aff. Cox v. Hickman, 8 House of Lords Cases 268.

(2) Again if from the contract between the parties, the legal effect of the instrument or legal intention tends to create a partnership, even though they agree and contract not to be partners, the law as to third parties will hold them to their intention. Wood et al v. Valette, 7 O. S. 172.

(3) The early English authorities namely "Grace vs Smith" and "Waugh vs Carver" laid down that all persons who shared the profits and losses, were partners. Later in Cox v. Hickman, it was argued by Lord Cranworth that this was a fallacy. "It is argued that as they would be interested in the profits, therefore, they would be partners. This no doubt, is in general, a sufficiently accurate test. For a right to participate in profits affords cogent, often conclusive evidence that the trade in which the profits have been made, was carried on in part for or on behalf of the person setting up such a claim.

But the real ground of the liability is that the trade had been carried on by persons acting on the partners behalf. When that is the case, he is liable to the trade obligations and entitled to its profits, or to a share of them. It is not strictly correct to say that his right to share in the profits makes him liable to the debts of the trade. The correct mode of stating the proposition is to say that the same thing which entitles him to the one makes him liable to the other, namely, the fact that the trade has been carried on, on his behalf, i. e., that he stood in the relation of principal towards the persons acting ostensibly as the traders by whom the liabilities have been incurred, and under whose management the profits have been made."

(4) In Beecher v. Bush, 45 Mich. 188, Mr. Justice Cooley says under the community of interest theory of a partnership the chief elements to be regarded are as follows: "Community of interest in some lawful commerce or business for the conduct of which the parties are mutually principals of and agents for each other, with general powers within the scope of the business, which powers, however, by agreement between the parties themselves, may be restricted at option, to the extent even of making one the sole agent of the others and of the business."

(4)

(a) State as fully as you can the different kinds of acts which are ordinarily within the implied authority of a partner in a trading partnership to do, so as to bind the firm and the other partners.

(b) State what kinds of acts are ordinarily not within the implied authority of a partner in a trading partnership.

(a) The following are some of the powers possessed by a partner in a trading partnership:

1. To sell or mortgage any personal property belonging to the firm, and even to dispose of the entire stock at one sale; but not to sell real property, because the conveyance must be by all the partners or by one authorized by power of attorney from the others; and not to transfer firm property in payment of his individual debt.

2. To purchase any goods dealt in by the firm or usually employed in such a business, but not other or different goods; a grocery partnership would not carry any implied power to purchase shoes.

3. To receive payment of debts due the firm and give receipts.

4. To make, accept, and endorse negotiable instruments in the name of a trading firm, that is, a firm that buys or sells; but in a nontrading partnership as a law firm, a hotel firm, or a mining firm, a partner does not possess this implied power.

5. To borrow money on the credit of a trading firm and give security by pledge or mortgage upon the firm property, but not in the case of a nontrading firm.

6. To engage agents and servants for the conduct of the business.

(b) The following are some of the powers which a partner may not exercise without the consent of his copartners:

1. To bind the firm by deed.

2. To bind the firm by a guaranty of his own or another's debt.

3. To bind the firm by a submission to arbitration or by a confession of judgment.

4. To assign the entire firm property to pay the firm debts unless the other partners are inaccessible and the matter is urgent. Huffcut, Elements of Law, § 142.

(5)

A, B, C and D were partners in a wholesale drygoods business. Pursuant to the terms of the partnership articles A contributed $50,000 to the firm but did not give any time or other service to its business; B contributed $30,000 to the firm, and gave part of his time to the business; C contributed $20,000 and put in all of his time in the business of the firm; while D contributed nothing and put in all of his time in the firm's business.

By the terms of the partnership articles, the profits were to be ascertained and equally divided at the end of each year, but there was no agreement in the partnership articles, or otherwise, with respect to the division of losses. Nor was there any agreement in said articles, or otherwise, with respect to the compensation to be paid to the members of the partnership who gave their time and service to the business of the partnership.

The partnership not being prosperous in its business was dissolved by the mutual consent of the partners at the end of the first year. The partners were not able to agree among themselves with respect to how the property and assets of the partnership should be divided and the accounts between the partners stated. Whereupon B filed an action in equity in the common pleas court against the other members of the partnership for an accounting and prayed for and obtained the appointment of a receiver for said partnership.

The receiver on order of the court sold the assets and property of the partnership and obtained therefor the sum of $56,000. Out of this money he paid the sum of $6,000 in satisfying the claims of firm creditors.

Assuming that the costs in the action including the receiver and attorney fees are otherwise provided for, and that all of said partners are solvent, what should be the provision of the court's decree with respect to the divison among the partners of the balance of $50,000 on hand, and with respect to the statement of accounts of said respective partners against the others?

The court should decree as follows: A should receive $37,500 of the remaining assets; B should receive $17,500; C should receive $7,500 and D not only gets nothing but must contribute $12,500 to the assets of the company, as his share of the loss.

The rule governing the distribution of assets of a partnership is summed up by "Gilmore" on "Partnership" as

follows: On the dissolution of a partnership, each member is entitled to draw out the proportion of capital which he contributed. But even though the proportions were unequal, it will be presumed in the absence of agreement to the contrary, that profits and losses are to be shared equally. In determining losses, the capital of each member is considered as a debt due from the firm, and each member will be required to contribute equally in order to make up the deficiency which the assets of the firm are unable to meet. In (Whitcomb v. Converse et al) Whitcomb, Converse, Stanton and Blyden entered into a partnership. Whitcomb and Converse contributed the entire capital. The partnership was dissolved by mutual consent, and Whitcomb wound up the business. The business resulted in a loss, and Whitcomb brought a bill in equity to compel contribution from the other partners to make his loss of capital. Blagden being insolvent, it was held that the capital contributed by each partner constituted a debt of partnership, and each solvent member must share equally in the loss. Gilmore on Partnership, §§ 47-48, p. 135-136.

In the absence of controlling agreement, partners bear the losses in the same proportion as the profits of the partnership, even if one contributes the whole capital and the other nothing but his labor or services. 3 Kent's Com. 28, 29.

(6)

A, a resident of H---- County, Ohio, and B, a resident of F---- County, Ohio, were members of a partnership formed for the purpose and doing business in this state under the firm name and style of the B---- Machine & Tool Company, with their offices, machine shop and principal place of business in said F---- County, Ohio.

To secure the payment of certain indebtedness incurred by the firm to one C, said partners duly executed and delivered to C a chattel mortgage made out in the firm name on certain goods and chattels belonging to the said partnership. After receiving said chattel mortgage C made thereon the affidavit required by law and filed the same with the county recorder of F---- County.

State whether or not C obtained thereby a valid prior lien on the property covered by said chattel mortgage as against D, a subsequent judgment creditor, who obtained a valid execution lien on the same property.

Discuss fully the legal rules, statutory and otherwise, involved in this question.

C did not obtain a valid lien as against D, the judgment creditor because the mortgage was not recorded in both counties.

"A partnership can execute a valid chattel mortgage in the firm name." A chattel mortgage or a conditional sale which is made by a partnership in the firm name is in fact the individual act of each of the individual partners. Powder Co. v. Jones Bros., 200 Fed. 638, 10 O. L. R. 571, citing Smith v. Burnett, 3 C. C. 594, 2 C. D. 344.

Notwithstanding G. C. § 11260, (provides that a partnership may be sued in its partnership name, without alleging or proving the names of the individuals constituting the firm), a partnership is not an entity, and cannot have a residence different from that of the partners composing it. Powder Co. v. Jones Bros.—Supra.

In Aultman & Co. vs Guy, 41 O. S. 598, it was held that a chattel mortgage executed by two or more persons, joint owners of the mortgaged property, in order to be kept alive as against creditors and subsequent mortgagees in good faith, must be refiled in all the townships (now counties) in which the mortgagors reside.

The statutes providing for the filing of chattel mortgages are: "A mortgage, or conveyance intended to operate as a mortgage, or goods and chattels, which is not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged shall be absolutely void as against the creditors of the mortgagor, subsequent purchasers, and mortgagees in good faith, unless the mortgage or a true copy thereof, be forthwith deposited as directed in next succeeding section". G. C. § 8560.

"The instruments mentioned in the next succeeding section must be deposited with the county recorder of the county where the mortgagor resides at the time of the execution thereof, if a resident of this state, and if not such resident, then with the county recorder of the county in which the property so mortgaged is situated at the time of the execution of the instrument." G. C. § 8561.

Hence G. C. § 8561 provides that chattel mortgages "shall be deposited with the clerk of the township where the mortgagor resides at the time of the execution thereof. G. C. § 27 permits us, in the interpretation of this section, to hold that words in the plural number include the singular and words in the singular include the plural, unless the context shows that another sense was intended. Applying this rule to the words quoted in G. C. § 8561 in a case where the chattel mortgage is executed by two or more makers, they provide that such a mortgage or a true copy thereof must be deposited with the clerks of the townships where the mortgagors reside. There is nothing in the context to show that another sense was intended, but the end sought by the legislature to be attained by these sections re-

quires that this construction should be adopted. See 41 O. S. 598 at p. 599.

"A mortgage made by joint mortgagors as partners residing in the different towns must be recorded in each of the towns in which the mortgagors reside. It does not follow that because the actual possession is in one of several owners, and his possession is in effect the possession of all, the registry of the mortgage in the town where he resides is sufficient. The statute requires the record to be made in the town where the mortgagor resides. But the word "mortgagor" must be regarded as including "mortgagors". No other construction of the statute would effectually secure the giving of the notice intended by the statute, or would remedy the evils it was intended to prevent. Jones on Chattel Mortgages, 5th Ed. § 257, p. 388.

(7)

What is the true test of partnership?

Numerous tests have been supposed to exist; but the best considered and least objectionable is that of a community of interest in the profits of a business or transaction as principal or proprietor. But this test is valuable as a rule chiefly because it evinces a relation between the parties where each may reasonably be presumed to act for himself and as agent for the others, and to that extent, establishes the fact, that the liability was incurred on the authority of all so participating in the profits. Participation in the profits on a business, however, cannot be regarded as a rule so universal and unrelenting as to be unjustly applied to a case where a debt is incurred by one who cannot be said to be acting in the particular transaction, as the agent, or on behalf of the party sought to be charged. Therefore, on principle the true test of a partnership, at least, is left to be that of the relation of the parties as principal and agent, to be proved by any competent evidence; for when they sustained that relation, a joint liability may be said to have been incurred by the authority, or on behalf of each of the parties so related. The tendency of the more modern authorities, both English and American, is to this conclusion. Harvey v. Childs & Potter, 28 O. S. 319, p. 321.

The authority of each partner to act as agent in matters relating to joint business is now established in this state as the true test of a partnership. Merchants National Bank v. Little, 4 C. C. 195, p. 202, 2 C. D. 500.

The Uniform Partnership Act (in force in 16 states not including Ohio) defines a partnership as follows: A partnership is an association of two or more persons to carry on as co-owners a business for profit.

(8)

X and Z are partners. They are insolvent and the firm is insolvent. There are no firm assets. There are firm creditors and individual creditors. Doe, your client, is a creditor of the firm and consults you as to whether or not he has a right in the distribution of the individual assets along with the individual creditors of the partners.

What would you advise?

Doe has a right in distribution of the assets along with individual creditors.

"If there are no joint assets for distribution, and no living solvent partner, firm creditors can share in the separate estates of the partners pari passu with individual creditors, the latter having no priority. Grosvenor v. Austin, 6 O. 103; Rogers v. Meranda, 7 O. S. 179; Brock v. Bateman, 25 O. S. 609.

The rule would have been otherwise, if there had been both individual and firm assets or if there had been a living solvent partner. "If however, the firm assets will pay the joint creditors but one-third of one percent, this is so insignificant, that they may share pari passu with individual creditors in the insolvent estate of a deceased partner." In re Robb, 5 N. P. 52, 5 D. (N. P.) 227 and 381.

The above rules no longer represent the law in a Federal Bankruptcy court. The Bankruptcy Act of 1898 was amended, Sec. 5-f. The act now provides that the net proceeds of partnership property shall go to pay partnership debts and the net proceeds of individual property shall go to pay individual debts of the partners. The statute was construed so as to prevent partnership creditors from sharing equally with individual creditors even though there were no partnership assets. In re Hull, U. S. Dist. Ct. of Ohio, 60 W. L. B. 224, 224 Fed. 796.

(9)

Is real estate of a partnership ever constituted personal property of the partnership? If so, when?

Yes. Where real estate is purchased with firm assets and managed and used as firm property, the title to which is in the individual names of the partners, and is not necessary to pay firm debts, the title and beneficial interest descends to the heirs. There must be clear evidence of an agreement, oral or written that it shall be converted out and out in order to warrant such a result. Weitz v. Weitz, 15 App. 134, 1921, Contra to Rammelsburg v. Mitchell, 29 O. S. 22.

Wherever partners manifest their intention to hold lands as partnership stock, either by express contract or by their

course of dealing, it will be treated as such by all courts of Equity. Summer v. Hampson et al. 8 Ohio 328; Ludlow v. Cooper, 4 O. S. 1.

In the absence of an agreement by the partners to work an out and out conversion of the firm real estate the courts hold that there is a pro tanto conversion only and that firm realty remaining in specie after payment of firm debts, is to be treated as realty. Gilmore on Partnership, p. 159.

(10)

Smith and Brown are partners. The firm is insolvent. Brown, your client, has no individual property. He consults you as to whether or not he is entitled to statutory exemption out of the partnership property. What would you advise him, and why?

He is not entitled to statutory exemption out of the partnership property.

"The only interest that a partner has in the partnership property, is his share of the surplus after all debts are paid." Place v. Sweetzer, 16 O. 142; Sutcliffe v. Dohrman, 18 O. 181; Nixon v. Nash, 12 O. S. 647.

Husband and wife who are co-partners in trade, are not entitled either jointly or severally to an allowance in lieu of homestead out of co-partnership assets, until the partnership debts have been paid. Young v. Stone, 55 O. S. 138, 45 N. E. 57; Lucke v. Burk, 20 N. P. (N. S.) 510, 29 D. 10. See also Gaylord Co. v. Imhoff Co., 26 O. S. 317.

(11)

A, B and C are partners. C borrows money from K on the credit of his individual note, which money so borrowed is used for partnership purposes. K consults you as to whether or not this creates a partnership debt or is the individual debt of C. What would you advise him, and why?

It is the individual debt of C. The credit was extended to C and not to the partnership. The mere fact that such money was used for partnership purposes, without other facts, is insufficient to create a partnership debt.

"Money borrowed by one partner on his individual credit will not become a debt of the firm by being used in its business." Bank v. Sawyer, 38 O. S. 339.

But in another case—"A loan to one partner on his sole credit, his note being taken, may be a liability of the firm as the real principal, if the firm is discovered to be the real borrower, and used the money without crediting such partner." Bank v. Little, 4 C. C. 195, 2 C. D. 496.

A borrowing by one partner on his individual note, with surety, does not create a firm debt by his applying the money

to partnership purposes. Accordingly, the surety cannot look to the other partners for reimbursement. Peterson v. Roach, 32 O. S. 374.

(12)

L and M are partners. M is individually indebted to S in the sum of $100, which amount he pays S out of the partnership money without the knowledge of L. L learns of this transaction a few days later and consults you as to whether or not he has a valid claim against S for the amount so paid. What would you advise, and why?

Yes.

L has a valid claim against S for an accounting. One member of a partnership has no authority to transfer the assets of the firm except in the course of partnership business; in order to bind the firm, acts done by a partner outside the scope of the partnership must be done pursuant to some authority express or implied. Thus a transfer of partnership assets by one partner in payment of his own pre-existing debt, does not divest the title of the firm, whether or not such creditors had knowledge that the partnership owned the property, unless it is shown that the firm ratified or authorized it. Morgenthaler v. Cohen, 103 O. S. 328, 132 N. E. 730.

The above answer is true in any case where the partner did not pay his debt with money or a negotiable instrument. In 103 O. S. 328, the partner used a non-negotiable chose in action and the court held that the assignee could get no better title than the assignor had.

Where money or a negotiable instrument is used to pay a pre-existing individual debt, the creditor gives value and if he did not know that the money did not belong to the payor, he gets an indefeasable title although the payor was a thief or a finder of the money. G. C. §§ 8157 and 8130, also § 8993-37.

(13)

Under what conditions, if any, can one contribute a specific sum of money to an existing partnership and escape liability for its debts?

One may escape the liability of partnership debts by an express stipulation, made with the party with whom the firm contracts the debts or by entering into a limited partnership or limited partnership association.

One can contribute a specific sum of money to an existing partnership and escape liability for its debts in a limited partnership under G. C. § 8037 which provides that special partners shall not be liable for partnership debts except to the amount of the capital invested and in case of

limited partnership association under G. C. § 8062 which provides that the members of such partnership association shall not be liable under any judgment, decree, or order obtained against the association, or for any debt or engagement of such company, further or otherwise than is hereinafter provided. For rules relating to limited partnerships see G.C.§§ 8036-8058 and for partnership associations, G.C.§§ 8059-8078.

For the manner of limiting his personal responsibility by an express stipulation, see Swan's Treatise, 25th Edition, p. 659.

(14)

Five men, A, B, C, D, and E form a partnership for the purpose of carrying on the business of manufacturing automobiles. The articles provide that the partnership should continue for a period of five years. A stipulation in the partnership agreement provides that the death of one of the partners should not operate to dissolve the partnership. At the expiration of one year B and C die. Does the partnership stand dissolved notwithstanding the stipulation? Give reasons.

Yes.

The business of the old firm may continue but technically a new firm is formed even though the personal representatives of B and C consent to the assets of the deceased partners remaining in the firm and that the business shall be carried on by the survivors or by the survivors and the two personal representatives. That such is the case is clearly demonstrated by the fact that a creditor of the new firm cannot hold the estates of B and C to any personal liability but can simply bind the assets of those two estates which are used in the prosecution of the firm business. Gilmore on Partnership, § 199; McGrath v. Cowen, 57 O.*S. 385, 49 N. E. 338.

(15)

X, Y and Z are partners. X conveys his entire interest in the partnership to A. Does A thereby become a partner? If not, what is the effect of the conveyance of X's interest to A?

No.

Another fundamental principle in partnership is known as "delectus personarum" the right of partners to choose their business associates in the partnership, so that A cannot thereby become a partner without the consent of the other partners. The result of X's conveyance is that he withdraws from the partnership, which action might lay himself open to suit for damages by the other partners if such withdrawal were contrary to the articles of partner-

ship and resulted in loss of credit and injury to the firm. Mechem's Elements of Partnership, §§ 57, 359.

(16)

Jones and Smith are partners in the practice of law. Jones is elected to the office of Judge of the Court of Appeals and is inducted into office. What is the effect on the partnership, if any, and why?

The partnership is dissolved, because his duties as a judge are inconsistent with the duties as partner. Attorneys in a firm are special agents for each other and have not the same control over their mutual business as ordinary business partners, who are general agents. Yet the position of a partner in a law firm would be so inconsistent ethically as well as legally with the position of the same person on the bench that election to the judgship should dissolve the partnership between them. A judge could not but be affected by his membership in an active law firm and in case any member of his firm should practice before him the situation would be unjustifiable.

No judge of any court of record in Ohio while holding commission as such judge, shall engage in the practice of law during his term of office either by appearing in court, by acting as advisory or consulting counsel for attorneys or others by accepting employment or acting as an attorney, solicitor, collector or legal advisor for any bank, corporation, loan or trust company, or otherwise engaging in the practice of law in Ohio or in or out of the courts. G. C. § 1706.

(17)

L, M. N and O are partners. The firm has indebtedness. O dies leaving individual debts, owning a farm worth five thousand dollars. The surviving members of the firm are without property, either partnership or individual. The indebtedness due the firm creditors is $5,000. The individual debts of O equal the same amount.

Will the firm or individual creditors prevail, or will there be a joint participation? Divide the $5,000 arising from sale of farm, as the law would divide. What would be the division if there were $2,500 partnership assets in addition to the $5,000 individual assets of O?

There will be a joint participation. When there are no firm assets and no living solvent partners the firm creditors and individual creditors share equally out of the deceased partners estate. The law would allow ½ to each set of creditors. Hence the $5,000 would be divided so that $2500 would go to creditors of the firm and $2500 to individual creditors.

If there were firm assets in the amount of $2500 in addition to the $5000 individual assets, then the firm creditors would have to look to firm assets only while the individual creditors would look only to individual assets. Hence firm creditors would get $2500 and individual creditors would take the $5000.

The rule in equity: "In the distribution of joint and separate assets of the insolvent partners, the individual assets of the partner are first applied to the debts of his individual creditors and partnership assets to partnership debts. This rule does not apply, if there is no joint estate for distribution, and no living solvent partner. But where there are joint and separate effects for distribution, the joint creditors can in equity only look to surplus of the separate estate of the partner after payment of his individual debts. The individual creditors can in equity, only seek distribution from partnership effects out of surplus of joint fund after payment of partnership debts. Individual creditors are not entitled to equal distribution with partnership creditors out of joint effects, on account of an indebtedness of the firm to such partner for money loaned by him to the firm unless the money loaned was obtained by the firm fraudulently or advanced by the partner, with an improper design to augment the joint estate by a reduction of the separate estate. Rogers Assignee of Murray v. Meranda, 7 O. S. 130.

The above rules no longer represent the law in a Federal Bankruptcy Court. The Bankruptcy Act of 1898 was amended, Sec. 5-f. The act now provides that the net proceeds of partnership property shall go to pay partnership debts and the net proceeds of individual property shall go to pay individual debts of the partners. The statute was construed so as to prevent partnership creditors from sharing equally with individual creditors even though there were no partnership assets. In Re Hull, U. S. Dist. Ct. of Ohio, 60 W. L. B. 224, 224 Fed. 796.

(18)

A sells to B a half interest in a horse, and it is agreed that B shall have possession of the horse for one year and that "the partners" (so styled in the agreement) are each to pay one-half of the expense of the horse during that time.

Does either or both of these engagements constitute a partnership?

If not, what is the relation of the parties to one another?

No.

The parties are merely tenants in common of the horse

with a special agreement regarding their duties as co-owners in the present case. Becoming joint owners in itself is not enough to create a partnership. The fact that the parties call themselves partners makes no difference. The test of a partnership was laid down in Cox v. Hickman, and has been adopted in Ohio. Participation in profits is not necessarily a decisive test of partnership. They must be shared as principals in a joint business in which each had the authority to bind the others. The relation and therefore the liability rests on agency except in cases of holding out. Harvey v. Childs, 28 O. S. 319.

"A partnership is an association of two or more persons to carry on as co-owners, a business for profit." Uniform Partnership Act, par. 6.

In the above case no business was carried on; A and B simply owned the horse in common.

(19)

Smith and Jones enter into a partnership agreement to conduct a mercantile business under the name Veribest Grocery.

(a) Could an action be brought against this business by suing the Veribest Grocery?

(b) Could the Veribest Grocery under any circumstances maintain an action as plaintiff after objection by the defendant that "Veribest Grocery" was not a proper party to bring an action?

(a) Yes.

A partnership formed for the purpose of carrying on a trade or business in this state or holding property therein, may sue or be sued, by the usual or ordinary name which it has assumed, or by which it is known. In such case it shall not be necessary to allege or prove the names of its individual members. G. C. § 11260.

(b) Yes.

Any persons doing business as partners, contrary to the provision of the next five preceding sections, shall not commence or maintain an action on, or on account of any contracts made, or transactions had in their partnership name in any court of this state, until they first file a certificate therein required; but if such partners at any time comply with such provisions, then they may commence an action, or if one has been commenced they maintain it on all such partnership contracts and transactions entered into prior to as well as after compliance, etc. G. C. § 8104.

This section refers to partnerships doing business under a fictitious name, who are required to file a certificate with the clerk of the common pleas court. G.C.§§ 8099 et seq.

See also G. C. § 8105, which provides that certified copies are presumptive evidence of acts therein stated.

A partnership doing business under a fictitious name, may commence or maintain an action under G. C. § 8104, without alleging compliance with the act requiring registration. Non-compliance may be shown as a defense and will defeat the action unless compliance with G. C. § 8099 be made during its progress. Walsh v. J. R. Thomas' Sons, 91 O. S. 210, 110 N. E. 454.

(20)

What is the method of procedure when a surviving partner refuses to take the interest of the deceased partner?

In the event that such surviving partner or partners refuse or neglect to take the interest of the deceasd partner in the partnership assets within the time, and in the manner above provided, such executor or administrator forthwith shall apply to a court of competent jurisdiction for the appointment of a receiver for the partnership, who thereupon must proceed to wind it up and dispose of its assets, in accordance with the statutes governing receivers. The probate court shall be a court of competent jurisdiction in the appointment and control of the receiver herein provided for. G. C. § 8091.

(21)

John Black and John White are partners doing business as Black and Company. The Standard Oil Company sells oil to the partnership and accepts checks signed "Black and Company; per John Black." Black desiring to purchase oil for his personal use tenders a partnership check for same. The Standard Oil Company writes White as follows: "We are selling your partner John Black $100.00 worth of oil. Will you be responsible on this account?" White replies in writing: "I will pay if Black does not." Black fails to pay and the Oil Company sues the partnership. Who should prevail? State reasons. Be Brief!

The partnership should prevail.

This was an individual debt contracted by Black and guaranteed by White, and is not a transaction involving the firm doing business as Black and Company.

The facts stated show that the creditors, the Standard Oil Company, recognized this to be an individual debt of Black, when they wrote to White, and White also recognized it as such when he guaranteed Black's debt.

Where a partner is known to be acting as such for a known partnership, it is the presumption that all the ordinary, informal contracts which he makes are upon the account of the partnership and they should be enforced in the usual manner. If, however, credit were given to him to the exclusion of the partnership, he would be the only one bound to the other party. Mechem's Elements of Partnership, 2nd Ed., p. 297, § 334.

Although a firm has the use and benefit of goods purchased, or money borrowed on a contract made by a partner on his personal credit, and in his individual capacity, this is not enough to make it liable on such contract. Rowley on Partnership, Vol. 1, p. 500 § 419 citing Peterson v. Roach, 32 O. S. 374. See also Wiebe v. Metz, 20 N. P. (N. S.) 254, 28 D. (N. P.) 168.

(22)

When partners disagree as to the distribution of profits, what course must be pursued for the enforcement of the claims of one partner against the partnership?

(1) Dissolution (2) accounting in equity and (3) suit at law, if claim disputed.

The general partners shall be liable to account to each other, and to the special partners, both in law and equity, for their management of the partnership affairs and business, as other partners are by law liable. Partnerships formed under this chapter, shall be liable to be dissolved in the manner, and for such frauds and mismanagement as furnish sufficient grounds for the dissolution of other partnerships formed for a certain and definite purpose. G. C. § 8051.

The right to an accounting arises on dissolution. Gray v. Kerr, 46 O. S. 652, 23 N. E. 136.

A partner cannot maintain an action for a money judgment against a co-partner upon a claim of payment of a partnership debt before a final accounting of partnership affairs has been had, except upon showing that that particular transaction had by agreement been withdrawn from the partnership account. And in the absence of such showing, it is a defense which will bar a recovery to show that the partnership has not been dissolved and that no final accounting of the partnership affairs has been had. Kunneke v. Mapel, 60 O. S. 1, 53 N. E. 259.

In a suit for an account by one partner against another no judgment can be rendered in favor of either party for any sum until the account has been stated, and the balance due either, if any, thus ascertained. Oglesby Exr. v. Thompson, 59 O. S. 60, 51 N. E. 878.

An ascertainment of the state of accounts is a necessary predicate to the rendition of any judgment in favor of a plaintiff. No other rule could be adopted consistently with the ends of justice. A partner has no right to recover of his co-partner any part of the earnings or profits of the business, until it has been ascertained that earnings or profits have been made, and an account stated between parties as to amount received by each. 59 O. S. 60, at p. 63, 51 N. E. 878.

(23)

Smith, Jones and Brown were partners. In his will, Smith provided as follows: "It is my wish that after my death the partnership of Smith, Jones and Brown be continued as if I were still a member and my share of the profits be turned over to the Salvation Army."

(a) After Smith's death would the Salvation Army be a partner?

(b) Would Smith's executor be a partner? State reasons. Be Brief!

(a) No.

Death revokes a partnership and moreover the principal of DELECTUS PERSONAE applies. McGrath v. Cowen, 57 O. S. 385, 49 N. E. 338.

Delectus personae (Latin, the choice of the person), the right of a partner to decide what new partners, if any, shall be admitted to the firm. Bouvier's Law Dictionary, Baldwin's Revision. Story, Partnership, 5, 195.

(b) No, McGrath v. Cowen, 57 O. S. 385; unless the surviving partners agreed to admit the personal representative as a partner. The doctrine of delectus personarum excludes even executors and representatives of partners from succeeding to the state and condition of partners. Bouvier's Law Dictionary, Baldwin's Revision. Lindley on Partnership, p. 590. Parsons on Partnership, § 343.

"A dissolution of a partnership takes place immediately on the death of one of its members; and a continuation of the business thereafter by the surviving partner and the executor of the deceased member, in pursuance of an agreement between them, is the formation of a new partnership, the terms of which, when not otherwise expressly agreed upon may be implied from the manner of conducting the business to be the same as those of the former partnership." 57 O. S. 385 at p. 401, 402, 49 N. E. 338.

(24)

What is the responsibility of a member of a limited partnership? Why?

"Such partnerships may consist of one or more persons, who shall be called general partners, and be jointly and severally responsible as general partners are by law and also of one or more persons who shall contribute in actual cash payments a specified sum as capital to the common stock who shall be called special partners, and not be liable for partnership debts, except in cases hereinafter mentioned. The capital invested by a special partner shall be held liable for all the debts of such firm." G. C. § 8037.

Provision is also made by statute that in case the limited partnership fails to advertise once a week for six weeks, at

the time of filing the articles with the county recorder, or any false statement is made in its certificate filed with the county recorder, or a special partner allows his name to be used in the firm name; then the special partner shall be liable in SOLIDO like a general partner. G. C. §§ 8040 to 8045.

(25)

A employs the firm of Smith, Brown & Jones, who are real estate agents, to sell his home. Jones, one of the partners, secretly buys the home for himself at $2,000 less than its value, without the knowledge of his partners. He reports to A that he has sold it to a third person. Later A learns the facts.

Can he hold the firm for the fraud?

Yes.

Fraudulent representations by one partner, in the course of the partnership business and transactions, will bind the firm and create a liability coextensive therewith. Peckham Iron Co. v. Harper, 41 O.S. 100.

(26)

Define a partnership, giving the essential elements.

A contract of partnership is one by which two or more persons agree to carry on a business for their own benefit, each contributing property or services and having a community of interest in the profits. It is, in effect, a contract of mutual agency, each partner acting as a principal in his own behalf and as agent for his co-partner. Gray, J., in 168 U.S. 334; cited in Bouvier's Law Dictionary, Baldwin's Revision.

Essential elements:

1. Two or more competent parties.
2. It involves ordinarily the contribution by the members of money, property, skill, labor, credit, or the like, to constitute the capital, stock, or foundation of the business.
3. It contemplates the transaction of some lawful business, trade or occupation, in which the parties are to be coowners and which they are to carry on as principals.
4. It is created not by law but by agreement of the parties. See Mechem on Partnership, § 2; Harvey v. Childs, 28 O.S. 319.

(27)

Smith and Jones entered into a partnership for the purchase of cattle. In the course of their business they borrowed money on a note upon which Black had signed as surety. Smith, one of the partners, became insolvent, and absconded, and Jones, the other partner, died. Can Black, who paid the note, recover against the estate of the deceased

partner without proceeding against the surviving partner? Give reasons.

Yes.

Where one of two partners is deceased, and the other insolvent, a surety for the firm, having paid the debt, may proceed in equity against the estate of the deceased partner, without prosecuting a suit against the survivor. Horsey v. Heath, 5 O. 353.

Where one of several who are jointly liable dies, leaving a solvent survivor, for good reason the law requires the pursuit of the survivor before you resort to the estate of the deceased; but the insolvency of the survivor, in our opinion, would exonerate the security from such pursuit, for the simple reason that the sole object and end of such pursuit, the obtaining satisfaction, is put beyond attainment by the insolvency; and neither law nor equity requires a vain thing. Horsey v. Heath, 5 O. 353, 355, 356.

(28)

A, B, and C were partners in the ownership and publication of a newspaper and printing business—each entitled to one-third of the profits for their services. A died, and B and C continued to carry on the business until it was sold a year later. At the time of A's death, the business was insolvent, but the following year B and C successfully operated the business and built up a good will and sold it at a profit.

In the absence of a specific agreement, can B and C recover compensation for their services? Give reasons.

Yes.

A partner, in the absence of an agreement for compensation, is not entitled to charge for services rendered in discharging his duties as a member of the firm; and it makes no difference whether the services are rendered before or after the dissolution of the firm.

But where a surviving partner is under no obligation to continue the business, but does so at his own peril, if the representatives of the deceased partner elect to share in the profits, a reasonable allowance may be deducted from such profits as a compensation to the survivor for his services. Cameron v. Francisco, 26 O.S. 190.

(29)

A, B and C, in the firm name of "A, B & C," were engaged in a general partnership, which executed its certain promissory note to the order of D. Thereafter, but before maturity of the note, C purchased it from D for a valuable consideration and thereby became the owner thereof. The partnership was in full force at date of maturity of the note. What remedy, if any, in an action at law did C have against his co-partners?

State reasons for your answer.

None. The remedy is equitable, i. e., action for an accounting.

One partner cannot maintain an action at law against the partnership of which he is a member to recover upon any claim which he may have against the partnership as such. The objections are of two sorts: First, there is the difficulty as to parties. The claimant is himself a member of the partnership against which he makes the claim, and if he should sue the partnership he must sue himself as one member of it. To be thus both plaintiff and defendant involves an inconsistency which the comman law procedure does not permit. Secondly, there is the difficulty as to the nature of the claim. The claimant contends that the firm owes him. It is, however, ordinarily impossible for him to show, without a final settlement of its accounts, whether the firm really owes him or not. There may be counterclaims of such extent that a final balance would prove him to be the debtor; and to reach this final balance the remedies of the common law are usually not adequate.

He may not sue his partners only (not joining himself as a defendant), for they alone do not owe the debt to him. Kunneke v. Maple, 60 O.S. 1, 53 N.E. 259; Mechem "Elements of Partnership" (1922), p. 182, § 199.

(30)

Allan, Brown and Clark were partners with a partnership name. The partnership, in payment of an account for materials furnished to it, executed and delivered its promissory note in its firm name to John Doe, Doe knowing the persons who constituted the partnership. Thereafter Clark retired from the partnership, and upon the date of maturity of the promissory note in question, Brown signed the partnership name to a renewal note and delivered the same to Doe, which was accepted by him, without knowledge that Clark had withdrawn from the firm.

Upon maturity of renewal note, state whether there was any liability thereon as against Clark, and in favor of Doe. State reasons for your answer.

Yes.

A partnership consisting of three members gave a note in payment of an account for materials furnished in the construction of a building. Subsequently one of the partners retired and one of the remaining partners signed the partnership name to a renewal note which was accepted by the original creditor. Held: The retiring partner is liable on the renewal note, as the remaining partner had authority to sign the partnership name and the original creditor was without notice of the dissolution of the partnership. Middletown Lumber Co. v. Martin, 10 App. 188.

In the case of Palmer v. Dodge, 4 O.S. 21, the court says, in the first paragraph of the syllabus: Held: That the dissolution of the partnership worked an absolute revocation of all implied authority in either of the partners to bind the other to new engagements, contracts, or promises, made to or with persons having notice of the dissolution, although springing out of or founded upon, the indebtedness of the firm.

It is therefore clear that in the absence of such notice the partnership would be bound by new engagements, contracts or promises entered into by one partner concerning the debts of the partnership, such as the execution of the renewal note for the partnership debt in the instant case. Lumber Co. v. Martin, 10 App. 188, 191, 192.

(31)

Can a partnership enter into partnership agreement with another partnership and thereby create a third partnership? Explain.

Yes.

With the consent of their members, two or more firms may enter into partnership, and a firm may also enter into partnership with one or more individuals. The associating firms may or may not continue to carry on their original and separate businesses. As respects creditors of the joint firm, the associating firms ordinarily lose their separate identity, and each member of each firm is liable as a partner in the joint firm; but as between themselves, for the purposes of accounting and the division of profits or losses, the respective firms may be regarded as the partners. Mechem, Elements of Partnership, p. 49, § 54.

(32)

Ames and Russell have under lease a hotel building and contents, and operate the hotel as partners. The business is very profitable. Russell, with Ames' consent, goes to England to visit relatives. While he is gone the lease expires. The owner of the property tells Ames that he would rather lease to him than to the partnership. Ames takes the lease to himself, and, beginning with the expiration of the old lease, operates the business in his own name. Ames accounts to Russell for the profits of the business up to the expiration of the old lease. Russell claims an interest in the profits during the full period and sues for an accounting and share of the profits beginning with the expiration of the old lease. Should Russell prevail? Give reasons.

Yes.

The relation of partners to each other is one of great confidence and trust, and the law demands from them the exercise of the highest integrity and good faith toward each

other. Each one is bound to use the partnership property and exercise his partnership powers for the benefit of the firm and not for himself alone. Profits made in the course of the partnership belong to the firm, and one partner will not be permitted to make gain for himself at the expense of the firm. This duty of good faith is intensified when one partner is conducting the business alone as managing partner.

If one partner takes a renewal in his own name of an existing lease to the firm, it enures to the benefit of the firm. This seems to be true even though there is to be a dissolution of the firm, because the chance of renewal is a firm asset. Mechem, Elements of Partnership, pp. 152, 153, § 170; see footnote.

(33)

Bates, Carr and Dean were partners conducting a retail store under the firm name of Bates, Carr and Dean. It was agreed among themselves that no one of the partners should borrow money for the firm. Bates went to Miles, who knew nothing of their private agreement, and told him that the firm had a bill to meet and that the firm wanted to borrow $1,000. Miles in good faith loaned the $1,000 and Bates agreed to bring him a note for the amount. Bates two days later brought and delivered to Miles a note payable to his order and signed by the firm name Bates, Carr & Dean. Bates signed the note and used the money for his own private purposes. Carr and Dean knew nothing of the transaction until sued on the note. Carr and Dean answered, setting up the agreement among the partners that no partner should borrow for the use of the firm, that they had no knowledge of the transaction, and that none of the money was used by the partnership but that all of the money was used by Bates personally. Can Miles recover from Carr and Dean? If so, why? If not, why?

Yes.

Partners in a mercantile business have the power to bind the firm by borrowing money for its use, and when money is bona fide so loaned for its use, a subsequent misapplication of the money to the individual use of the partner will not deprive the lender of his remedy against the other members of the firm. Kleinhaus v. Generous, 25 O.S. 667.

Among the implied powers of a partner, one of the most important and necessary is, that of borrowing money on the credit of the firm. The members of a trading partnership could not meet the sudden exigencies of commerce if they did not possess this power. Accordingly, it is now well settled, that in ordinary commercial partnerships, each partner has the right to borrow money for partnership purposes, in the firm name, and when credit is thus extended to a

partnership, it will bind all the partners notwithstanding any private arrangement among themselves, if such arrangement be not known to those giving the credit. The loan must be made in good faith, for the use of the firm, and if so made, a subsequent misapplication of the money to the individual use of the partner, will not deprive the lender of his remedy against the other members of the firm. Benninger v. Hess, 41 O.S. 64, 66.

(34)

Brown and Smith are partners actively engaged in business. Brown claims that Smith has drawn $1,000 from the business in excess of the amount to which he was entitled and sues Smith to recover that amount. A demurrer is filed to the petition. Should the demurrer be sustained or overruled and why?

The demurrer should be sustained.

It is a well established rule that one partner cannot, in the absence of a showing that, by some special agreement, the particular matter has been withdrawn from the partnership account, maintain an action at law against another to recover an amount claimed by him by reason of partnership transactions, until there has been a final settlement of the business of the partnership. Before such settlement, his only remedy is to allege the pertinent facts and ask a dissolution and accounting and an ascertainment of the balance, and for a recovery upon such accounting. The reasons for such rule are so apparent, and the rule itself so well understood, that it seems unnecessary to take space to state the reasons, or to cite authorities in support of the rule. It may, however, be proper to add that the above principle follows as an immediate corollary from the rule declared in Oglesby v. Thompson, 59 O.S. 60; Kunneke v. Mapel, 60 O.S. 1, 6.

(35)

A and B are partners as A & B. The firm became insolvent and made assignment for benefit of creditors. Each of the partners being also insolvent made assignment for benefit of his creditors. The partnership creditors filed their claims with the partnership assignee and also claimed the right to participate in the dividends of the individual estates of the partners on equal terms with their individual creditors. What should be the order of distribution? Why?

The partnership creditors can, in equity, only look to the surplus of the separate estate of a partner, after the payment of his individual debts. The individual creditors can, in equity, only seek distribution from the partnership effects, out of the surplus of the joint fund, after payment of the partnership debts.

It is a rule of equity, in the distribution of the joint and separate assets of insolvent partners, that the individual assets of a partner be first applied to the individual creditors, and the partnership assets first to the partnership debts; the preference of the separate creditors in the individual property resulting, as a necessary correlative, from the priority of the joint creditors in the joint effects, inseparable from the nature of the relation of the partners to each other. Rogers v. Meranda, 7 O.S. 179.

(36)

Can man and wife join as members of a partnership?
Can a corporation be a member of a partnership?

(a) Yes.

That a married woman had not capacity at common law to enter into a partnership with her husband will not admit of serious controversy. Payne v. Thompson, 44 O.S. 192, 204.

Now they may by express terms enter into partnership relations with each other, and divide profits in accordance with the terms agreed upon. The wife may furnish the capital, and the husband the skill, labor and experience, the same as other persons frequently do in partnership matters. Strong v. Bueschner & Sons Co., 19 N.P.(N.S.) 49, 60.

(b) Before the new corporation act, it was consistently held that it is beyond the power of a corporation to enter into partnerships with individuals or other corporations. Bank v. Wagon Co., 6 N.P. 264, 9 D. 380; Geurinck v. Alcott, 66 O.S. 94, 63 N.E. 714; State v. Standard Oil Co., 49 O.S. 137, 30 N.E. 279; Fechteler v. Palm Bros., 14 O.F.D. 369, 133 Fed. 462.

The new corporation act, however, provides that, every corporation of this state, heretofore or hereafter organized, shall have the capacity possessed by natural persons to perform all acts, within or without this state. G.C.§ 8623-8.

(37)

Black published in a newspaper repeatedly, advertisements of his firm's business as security dealers. Among the members, he listed Green, whom he scarely knew and who had nothing to do with the business. Green saw it, wrote demanding he stop it, and then forgot about it.

Is Green liable when the firm fails a month later?
Why?

No.

Where the conduct of a party is relied upon to charge him as a member of a firm of which he is not in fact a member, it should appear that the creditor relied on such conduct, and trusted the firm on the faith of such party being a member. Cook v. Penryhn Slate Co., 36 O.S. 135.

In order to the existence of this liability, two main facts must be found:

1. The condition or thing relied upon as evidence of the holding out must have been caused either by the party to be charged as partner, in person, or by another with his knowledge and consent; and

2. The party seeking to hold him liable as a partner must, in the exercise of reasonable prudence and good faith, have relied upon such condition or thing and been misled by it. Mechem, Elements of Partnership, § 102.

(38)

Harper's firm was agent of the Iron Co. for the sale of its products. Without telling his partners, he sold fifty tons to a purchaser, but reported it as three hundred tons in order to get possession of the iron and secretly took the extra two hundred and fifty tons himself, although the principal had expressed its desire to decrease the amount of the sale substantially.

Are Harper's partners liable for such damages as may result from his fraud? Why?

Yes.

The false representations by E. L. Harper were made in the name of the firm, and in the course of its regular business. His partners are therefore bound, although they may have had no knowledge of or connection with, his dealings with the plaintiff. Fraudulent representations by one partner, in the course of the partnership business, will bind the firm and create a liability coextensive therewith. Story on Partnership, §§ 108, 131; Peckham Iron Co. v. Harper, 41 O.S. 100, 109.

(39)

A partnership in its articles provided that new partners might be admitted by a majority vote of the old partners. Can a partner who objects seriously to the admission of a proposed new member prevent it? Why?

Yes.

The principle of delectus personarum (Lat. the choice of the persons) applies.

The requirement of a contract for the creation of a partnership is founded upon the principle of delectus personarum, or right of selection, and this in turn grows out of the nature and consequences of the relation. When a man enters into a partnership, he certainly commits his dearest rights to the discretion of every one who forms a part of that partnership. It is an imprudent thing for a man to enter into partnership with any person, unless he has the most implicit confidence in his integrity. Within the scope of the part-

nership one partner may bind his copartners by his contracts and acts, may pledge their credit and may convey a perfect title to the firm chattels. The property or money which one puts into a partnership venture ceases to be his exclusively and comes under the control and disposition of his copartners. Because of the powers of partners to subject one another to liability and to deal with common property, and because of the mutual confidence and trust required in the relation, this right of selection of one's associates is a fundamental principle, not only in the establishing, but also in the continuance, of the relation. It therefore follows that no person can be introduced as a partner without the consent of himself and of all those who for the time being are members of the firm. Gilmore Partnership, pp. 71, 72, § 22.

Personal Property

(Numbers in parenthesis refer to answers following.)

I. POWER OF ATTORNEY.

Principal and Agent, 41, 42.

G.C.§§ 8512, 8536 to 8541.

II. CHATTELS REAL; LEASES; LANDLORD AND TENANT.

A. In General. (3b, 12, 13, 19)

Landlord and Tenant, 1 to 64.

112 O.S. 306; 13 App. 294; 12 C.C.(N.S.) 225; 23 N.P.(N.S.) 579.

B. Term for Years.

Landlord and Tenant, 66 to 107.

G.C.§§ 8510 to 8517, 8621; 95 O.S. 344; 23 N.P.(N.S.) 209; 17 D. 354.

C. Tenancies from Year to Year and Month to Month.

Landlord and Tenant, 110 to 117.

7 O.S. 158; 60 O.S. 427; 67 O.S. 250; 95 O.S. 344; 26 App. 181.

D. Tenancies at Will and at Sufferance.

Landlord and Tenant, 120 to 122.

27 O.S. 478; 65 O.S. 507; 2 D. Repr. 630.

E. Premises, Repair, Enjoyment and Use; Liability of Landlord.

Landlord and Tenant, 125 to 193.

83 O.S. 339; 112 O.S. 122; 118 O.S. 334; 118 O.S. 576; 17 App. 162; 23 App. 363; 25 App. 393; 27 App. 535; 26 N.P.(N.S.) 455.

F. Rent and Advances; Recovery of Possession by Landlord. (2)

Landlord and Tenant, 197 to 263.

G.C.§§ 8521, 10447 to 10461; 15 O.S. 186; 30 O.S. 569; 42 O.S. 180; 47 O.S. 396; 56 O.S. 39; 61 O.S. 432; 97 O.S. 54.

III. CHOSE IN ACTION. (3c, 12b)

Chose in Action, 1 et seq.

G.C.§ 11760; 3 C.C. 102.

IV. CHATTEL MORTGAGES.

A. Form, Filing and Recording. (4c, 15a)

Chattel Mortgages, 2 to 48.

G.C.§§ 8560 to 8565-2, 8623-74; 40 O.S. 569; 48 O.S. 237; 80 O.S. 104.

[*References are to Bates' Compact Ohio Digest.*]

B. Construction, Lien and Priority. (16, 39)

Chattel Mortgages, 51 to 80.

4 O.S. 481; 45 O.S. 625; 57 O.S. 169; 107 O.S. 583; 18 App. 242.

C. Rights and Liabilities of Parties and Creditors. (15b, 16, 37, 39)

Chattel Mortgages, 83 to 109.

G.C.§§ 8566, 8567; 50 O.S. 19; 68 O.S. 535; 115 O.S. 235; 18 App. 235; 19 App. 29; 20 App. 256; 30 O.C.A. 551.

V. MOTOR VEHICLES. (1)

Motor Vehicles, 1 et seq.

G.C.§§ 6290 to 6310-14; 111 O.S. 274; 115 O.S. 182; 117 O.S. 69.

VI. ANIMALS AND DOGS.

Animals, 1 et seq.

G.C.§§ 5652, 5652-2, 5808, 5809, 5816 to 5819, 8537 to 8541; 40 O.S. 6; 67 O.S. 157; 78 O.S. 68; 89 O.S. 61; 107 O.S. 75; 109 O.S. 519; 116 O.S. 549.

VII. BANK DEPOSITS AND ACCOUNTS. (28)

Banks and Banking, 62 to 82.

58 O.S. 218; 114 O.S. 241; 22 App. 213; 27 App. 284; 27 L.R. 265.

VIII. EMBLEMENTS AND TIMBER. (14, 34, 35)

Landlord and Tenant, 144, 145, 266.

G.C.§ 8456; 3 O.S. 438; 6 O.S. 90; 40 O.S. 339; 47 O.S. 544.

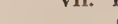
IX. TAXATION AND INHERITANCE TAX. (40)

Taxation, 8 et seq.

G.C.§§ 5320 to 5335, 5366, 5370 to 5372-1, 5381 to 5399, 5404-1.

X. GIFTS.

A. Inter Vivos. (5, 31)



Gifts, 1 to 13.

G.C.§§ 8617 to 8619; 23 O.S. 473; 31 O.S. 457; 41 O.S. 642; 45 O.S. 108; 23 App. 163; 19 C.C.(N.S.) 51; 23 C.C.(N.S.) 182; 24 C.C.(N.S.) 95.

B. Causa Mortis. (5)

Gifts, 19 to 23.

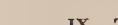
Deibel's Ohio Probate Manual, §§ 563, 564; 112 O.S. 202; 22 App. 295; 7 N.P. 79; 7 N.P.(N.S.) 293; 26 N.P.(N.S.) 57.

XI. CONFUSION OF GOODS. (9)

Confusion of Goods, 1 et seq.

G.C.§ 9022; 18 O.S. 184; 36 O.S. 643; 46 O.S. 244; 7 N.P. 575.

XII. FIXTURES. (3d, 12c, 20, 37, 40)



Fixtures, 1 et seq.

1 O.S. 511; 11 O.S. 482; 14 O.S. 558; 15 O.S. 446; 42 O.S. 59; 45 O.S. 289; 13 App. 259; 11 C.C.(N.S.) 488; 9 N.P.(N.S.) 218; 13 N.P.(N.S.) 27.

XIII. SALES.

A. Requisites, Construction, Subject Matter of Contract. (6, 7, 13b, 22, 23)

Sales, 1 to 38.

G.C.§§ 6404, 8381 to 8390, 8451 to 8456; 92 O.S. 44; 106 O.S. 328; 17 App. 279; 21 App. 373; 17 C.C.(N.S.) 491; 19 L.R. 467.

B. Modification or Recission of Contract.

Sales, 41 to 57.

G.C.§§ 8433, 8441, 8442.

C. Performance of Contract, Delivery and Acceptance. (7a, 29)

Sales, 60 to 99.

G.C.§§ 8397 to 8402, 8421 to 8431; 83 O.S. 178; 92 O.S. 44; 110 O.S. 208; 113 O.S. 499; 24 C.C.(N.S.) 385; 25 C.C.(N.S.) 63; Article in 19 L.R. 204.

D. Transfer of Title as Between Parties. (7d, 22)

Sales, 102 to 114.

G.C.§§ 8403 to 8420, 8426; 78 O.S. 358; 93 O.S. 72; Articles in 19 L.R. 467; 20 L.R. 61.

E. Rights and Liabilities of Buyer or Seller as to Third Persons. (11, 21)

Sales, 117 to 125.

G.C.§§ 8414, 8568; 85 O.S. 196.

F. Warranties, Express and Implied. (38)

Sales, 127 to 146.

G.C.§§ 8391 to 8396, 8416; 11 O.S. 48; 55 O.S. 404; 70 O.S. 16; 18 App. 392; 23 App. 319; 18 C.C.(N.S.) 346; 11 N.P.(N.S.) 141; 16 N.P.(N.S.) 577; 17 D. 705.

G. Remedies and Rights of Seller. (29)

Sales, 149 to 195.

G.C.§§ 8432 to 8445, 8450; 49 O.S. 41; 89 O.S. 365; 116 O.S. 482; 21 App. 482.

H. Remedies and Rights of Buyer. (17, 21, 26, 30, 36)

Sales, 198 to 240.

G.C.§§ 8424, 8427, 8446 to 8450; 92 O.S. 76; 104 O.S. 507; 2 App. 430; 5 App. 454; 14 App. 421; 24 App. 434; 16 C.C.(N.S.) 439; 17 C.C.(N.S.) 3; 23 C.C.(N.S.) 479; 7 C.D. 209.

I. Conditional Sales. (4c, 20)

Sales, 243 to 261.

G.C.§§ 8568 to 8572; 58 O.S. 194; 59 O.S. 11; 78 O.S. 149; 85 O.S. 104; 110 O.S. 255; 11 C.C. 432; 22 C.C.(N.S.) 168; 25 C.C.(N.S.) 61; 143 Fed. 315; 250 Fed. 657.

XIV. FRAUDULENT CONVEYANCES, BULK SALES LAW. (10)

Fraudulent Conveyances, 1 et seq.

G.C.§§ 11102 to 11107; 84 O.S. 1; 100 O.S. 58; 10 App. 45; 16 App. 387.

XV. LIENS. (32, 39)

Liens, 1 et seq.

G.C.§§ 5672, 5984, 8353 to 8359; 3 D. Repr. 303.

Definitions

PERSONAL PROPERTY.—The right or interest which a man has in things personal. The right or interest less than a freehold which a man has in realty, or any right or interest which he has in things movable. Bouvier's Law Dictionary, Baldwin's Revision.

CHATTELS REAL.—Real chattels are interests which are annexed to or concern real estates; as, a lease for years of land. Bouvier's Law Dictionary, Baldwin's Revision.

WHEN DOG CONSIDERED PROPERTY.—A dog which has been listed and valued for taxation as personal property, and the tax upon such valuation and per capita tax upon such dog having been paid, if due, shall be considered as personal property and have all the rights and privileges and be subject to like lawful restraints as other live stock. A recovery shall not be had for the malicious and unlawful killing of such dog in excess of double the amount for which it is so listed. Throckmorton's General Code of Ohio, § 5837.

FILING CHATTEL MORTGAGE.—A mortgage, or conveyance intended to operate as a mortgage, of goods and chattels, which is not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, subsequent purchasers, and mortgagees in good faith, unless the mortgage, or a true copy thereof, be forthwith deposited as directed in the next succeeding section. Throckmorton's General Code of Ohio, § 8560.

EMBLEMENTS.—The right of a tenant to take and carry away, after his tenancy has ended, such annual products of the land as have resulted from his own care and labor. The term is also applied to the crops themselves. Bouvier's Law Dictionary, Baldwin's Revision.

GIFTS INTER VIVOS.—Gifts inter vivos are gifts made from one or more persons, without any prospect of immediate death, to one or more others. Gifts inter vivos have no reference to the future, and go into immediate and absolute effect. Delivery is essential. Without actual possession, the title does not pass. A mere intention or naked promise to give, without some act to pass the property, is not a gift. Bouvier's Law Dictionary, Baldwin's Revision.

GIFTS CAUSA MORTIS.—Gifts causa mortis are gifts made in prospect of death. Gifts inter vivos and gifts causa mortis differ in nothing, except that the latter are made in expectation of death, become effectual only upon the death of the donor, and may be revoked. Otherwise, the same principles apply to each. Bouvier's Law Dictionary, Baldwin's Revision.

FIXTURES.—Personal chattels affixed to real estate, which may be severed and removed by the party who has affixed them, or by his personal representative, against the will of the owner of the freehold. Bouvier's Law Dictionary, Baldwin's Revision.

OHIO STATE BAR EXAMINATIONS

QUESTIONS WITH ANSWERS

[*Arranged Chronologically.*]

(1)

The police department of the city of X took possession of an automobile on which the original numbers had been changed and other numbers substituted. Upon investigation it was discovered that the car carrying the new numbers, taken by the police department was still in possession of the original purchaser. The department thereupon refused to return the car to the person from whose possession it was taken claiming it was a stolen car because of the fact that the numbers had been changed, this act alone being a violation of the law. B brought suit in replevin to recover the car. Can he recover?

B can recover only if he shows that he has title to the car, or at least the right to possession of it. The fact alone that the numbers on the car have been changed will not entitle the police department to withhold indefinitely, the car from B, although no doubt if B changed the numbers, he would be guilty of violation of the law and would be subject to punishment prescribed by it. Also, the police department were undoubtedly justified in investigating the matter and could properly hold the car, until due investigation has been made concerning it, for the purpose of the law was to prevent the stealing of cars. When B sues, if he can show a right to possession, his right is good against all the world, except the true owner. For general discussion see Berry on Automobiles, 4th Ed., § 1768.

(2)

If A came into your office and employed you to recover a parcel of real estate to which he claims title and ownership, and also the personal property on said real estate, what kind of an action would you bring to recover the property?

I would bring an action of ejectment under G. C. § 11903, or an action for forcible entry and detainer under G. C. § 10447, to recover the real property.

I would bring an action of replevin to recover the personal property under G. C. § 12051.

G. C. § 11306, providing what causes of action may be joined does not permit joinder of actions for the recovery of real and personal property; and hence, separate actions must be brought unless other grounds than those herein stated appear for joining them.

(3)

(a) How is property divided in Ohio?
(b) What is a chattel real? Give illustration.
(c) What is a "chose in action?" Do they belong to any property classification?
(d) Can the character of the property be changed, if so, how?

(a) Property may be divided in two different ways, namely:

1. Things in possession and things in expectation or it may be divided into,

2. Things real and things personal which also include chattels real or interests in land less than freehold. Walker's American Law § 21, p. 62, 63.

Ordinarily property is divided into two main divisions, I. Personal Property and II. Real Property.

I. Personal Property consists of,
a. Choses in action
b. Choses in Possession
c. Estates in land less than freehold
II. Real property consists of—
a. Fee estates, or estates of inheritance, i.e,
(1) Fee simple
(2) Fee tail
(3) Determinable fee, sometimes called conditional fee, qualified fee or base fee.
II—b. Life estates, which are—
(1) General
(2) Pur autre vie
(3) Dower

II—c. Fixtures are also classed as realty. But estates less than freehold as: (1) Terms of years; (2) Tenancy from year to year; (3) Tenancy at will; (4) Tenancy by sufferance; are regarded as personalty. See Tiffany on Real Property, 2nd Ed., p. 39, § 19.

(b) A chattel real or chattel interest as it is sometimes called is any interest in land of less dignity than a freehold. Ballentine's Law Dictionary, p. 63, 442.

Although immobility is the distinguishing characteristic of realty, an indefinite duration of interest also enters into the idea and therefore certain determinate interests in land, as leases for years, are called chattels real, yet for want of indefinite duration, they are treated as chattels. Walker's American Law, p. 63.

Three examples of chattels real are (1) estates for years (2) at will (3) by sufferance. Warvelle's Real property, 3rd Ed., p. 91.

(c) A chose in action is defined thus: A right to receive or recover a debt, or money, or damages for breach of contract, or for a tort connected with a contract, but which

cannot be enforced without action, and, therefore termed chose or thing in action. Hafer v. Cincinnati, 3 C. C. 101, 2 C. D. 56; Denning v. Nelson, 10 W. L. J. 218, 1 Dec. Repr. 505.

If I agree to deliver property to you, and forthwith deliver it, this is an executed contract on my part, and the effect is to convey to you something in possession, but if you do not, at the time, pay the price agreed, the contract so to do is executory on your part, and as I may be compelled to resort to an action against you to enforce payment, the effect is to give me a right of action. Hence the interest of a party in an executory contract is technically called a thing or chose in action.

They belong to the classification of personal property. Walker's American Law, p. 467.

(d) Yes, the character may be changed as follows:

a. Equitable conversion; that is when partnership real estate is bought with firm funds and used in the business, it becomes converted out and out into personalty. Ramelsberg v. Mitchell, 29 O. S. 22.

b. By an act of the legislature, as a lease for 99 years, renewable forever, regarded as personalty, but realty for the purposes of descent and distribution. G. C. § 8597.

c. When personal property such as chattels, are annexed to real estate, they sometimes become fixtures, depending on:

1. The manner of annexation;
2. The contract of the parties;
3. The character of the subject-matter;
4. The effect of removal.

Teaff v. Hewitt, 1 O. S. 511 at p. 530; Case Mfg. Co. v. Garven, 45 O. S. 289, 13 N. E. 493.

(4)

(a) In determining the disposition of real and personal property what law governs?

(b) How is title to real and personal property acquired?

(c) What distinction, if any, is there between a conditional sale and a chattel mortgage in reference to title to property?

(a) The lex rei sitae governs the disposition of real property and the lex domicili, that of personal property.

The acquisition of real estate, whether by descent, or devise, is governed by the lex rei sitae. Jones v. Robinson, 17 O. S. 171.

Personal property has no fixed situs, adheres in contemplation of law, to the person of the owner, and is disposed of, in almost every respect, whether of transfer inter vivos, testamentary dispositions, or successions, by the law of his domicile. The principle is founded in an enlarged

policy, growing out of the transitory nature of personal property, and the general convenience of nations. Swearingen v. Morris, 14 O. S. 424.

(b) Title to real property may be acquired by:

1. Occupancy, such as prescription and accretion.
2. Marriage i. e, dower.
3. Descent or inheritance.
4. Devise.
5. Purchase or assignment. Walker's American Law, p. 389, § 175.

Title to personalty may be acquired by:

1. Custom
2. Occupancy
3. Forfeiture
4. Prerogative
5. Succession
6. Marriage
7. Judgment
8. Gift or grant
9. Contract
10. Bankruptcy
11. Administration
12. Testament. Blackstone's Comm., Vol. II, Chap. 26.

(c) In a conditional sale, title does not pass until the amount specified is paid or until the condition has been met, and, only possession passes in the meantime. In a chattel mortgage, title passes immediately, and possession may or may not pass.

The Code Sections relating to conditional sales and chattel mortgages are as follows:

"When personal property is sold to a person to be paid for in whole or part in installments, or is leased, rented, hired, or delivered to another on condition that it will belong to the person purchasing, leasing, renting, hiring, or receiving it, when the amount paid is a certain sum, or the value of the property, the title to it to remain in vendor, lessor, renter, hirer or deliverer thereof until such sum or the value of the property or any part thereof, has been paid, such condition, in regard to the title remaining until payment, shall be void as to all subsequent purchasers and mortgagees in good faith and creditors unless the conditions are evidenced by writing, signed by the purchaser, lessee, renter, hirer or receiver thereof (etc.)." G. C. § 8568.

"A mortgage, or conveyance intended to operate as a mortgage of goods and chattels, which is not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, subsequent purchasers, and mortgagees in good faith, unless the mortgage or a true copy thereof, be forthwith

deposited as directed in the next succeeding section." G. C. § 8560.

(5)

What is a gift "inter vivos?" What is a gift "causa mortis?" Distinguish between the two and give essential elements necessary to make them effective.

A gift inter vivos is an immediate, voluntary and gratuitous transfer of personal property by one to another. It is essential to its validity that the transfer be executed, for the reason that there being no consideration therefore, no action will lie to enforce it. Flanders v. Blandy, 45 O. S. 108 at p. 113, 12 N. E. 321.

A gift causa mortis is a gift in prospect of death, which may be revoked before death, and is not complete during donor's life, but takes effect only upon his death. Gano v. Fisk, 43 O. S. 462 at p. 470, 3 N. E. 532.

Gifts causa mortis differ from gifts inter vivos in that the former are made in expectation of death, become effectual only upon the death of the donor, and may be revoked. Otherwise, the same principles apply, a change of possession with the intention of conferring ownership on the donee. 43 O. S. 462 at p. 470 supra., 3 N. E. 532.

(6)

If any, to what extent does the statute of frauds apply to contracts for the sale, exchange and delivery of personal property?

No action shall be brought whereby to charge a defendant upon an agreement that is not to be performed within one year from the making thereof, unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged therewith, or some other person thereunto by him, or her lawfully authorized. G. C. § 8621.

A contract to sell or sale of any goods or choses in action of the value of twenty-five hundred dollars, or upwards, shall not be enforceable by action, unless the buyer shall accept part of the goods, or choses in action so contracted to be sold, or sold, and actually receive them, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf.

The provisions of this section apply to every such contract or sale, notwithstanding, that the goods may be intended to be delivered at some future time, or may not at the time of such contract or sale, be actually made, procured or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or ren-

dering them fit for delivery, but if the goods are to be manufactured by the seller, especially for the buyer, and are not suitable for sale to others in the ordinary course of the seller's business, the provisions of these sections shall not apply. G. C. § 8384.

Under the definition of a sale, (G. C. § 8381), "A sale of goods is an agreement whereby the seller transfers the property in the goods to the buyer for a consideration called the price." Since, according to the terms of this definition, the consideration need not be paid in money, exchanges or barters are included under the term sale.

(7)

Define the following terms as used in the "Uniform Sales Act":

(a) Delivery.
(b) Future goods.
(c) Fungible goods.
(d) Document of title to goods.

(a) "Delivery" means voluntary transfer of possession from one to another. G. C. § 8456.

(b) "Future goods" means goods to be manufactured or acquired by the seller after the making of the contract of sale. G. C. § 8456.

(c) "Fungible goods" means goods of which any unit is from its nature or by mercantile usage treated as the equivalent of any other unit. G. C. § 8456.

(d) "Document of title to goods" includes any bill of lading, dock warrant, warehouse receipt or order for the delivery of goods, or any other document used in the ordinary course of business in the sale or transfer of goods, as proof of the possession or control of the goods, or authorizing or purporting to authorize the possessor of the document to transfer or receive, either by endorsement or by delivery, goods represented by such document. G. C. § 8456.

(8)

(a) Define conversion at law.
(b) Define conversion in equity.

(a) Conversion at law is the wrongful appropriation of the goods of another.

An unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of the owner's rights. Bouvier's Law Dictionary, Baldwin's Revision.

(b) Conversion in Equity—the exchange of property from real to personal or from personal to real, which takes place under some circumstances in the consideration of the law, such as to give effect to directions in a will or settle-

ment, or to stipulations in a contract, although no such change has actually taken place. Bouvier's Law Dictionary, Baldwin's Revision.

(9)

A junk dealer, by fraudulent collusion with a section-hand without authority from his employer, obtained large quantities of railroad scrap metal at much less than its value, and, on delivery, threw it into other heaps of scrap belonging to him, so as to be indistinguishable.

(a) What are the rights of the railroad company?

(b) What are the junk dealer's rights?

(a) The Railroad Company gets title to the entire heap of scrap. Where one fraudulently, wilfully, or wrongfully intermingles his goods with those of another, so that, there is no evidence to distinguish the goods of the one from those of the other, the wrong-doer forfeits all his interest in the mixture to the other party, if the goods cannot be identified or apportioned. Grossman v. Wenham, 10 C. C. 348, 6 C. D. 563, 12 C. J. 491, Sub. 3.

(b) The junk dealer cannot recover for his own proportion, or for any part of the intermixture, but the entire property vests in him whose right is invaded. However, the rule that a wrongful or fraudulent confusion of goods works a forfeiture of the interest of the wrong-doer in the mixture is adopted solely to prevent fraud and will not be extended further than that object requires; it is never resorted to, except in favor of an innocent party as against a wrong-doer.

The rule that a person who mingles his goods with those of another person forfeits his own goods does not apply when the act was not done willfully, with a fraudulent or other improper intent or purpose. Grossman v. Wenham 10 C. C. 348, 6 C. D. 563, 12 C. J. p. 492.

(10)

State in general terms the provisions of the so-called "Bulk Sales Law."

The sale, transfer or assignment, in bulk, of any part or the whole of a stock of merchandise, or merchandise and the fixtures pertaining to the conducting of said business, or the sale, transfer or assignment in bulk of the fixtures pertaining to the conducting of said business, otherwise than in the ordinary course of trade and in the regular and usual prosecution of the business of the seller, transferror or assignor, shall be void as against the creditors of the seller, transferror, assignor, unless the purchaser, transferee or assignee demands and receives from the seller, transferror or assignor a written list of names and addresses of the creditors of the seller, transferror and assignor, with the

amount of the indebtedness due or owing to each and certified by the seller, transferror and assignor, under oath, to be a full, accurate and complete list of his creditors, and of his indebtedness; and unless the purchaser, transferee or assignee shall, at least five (5) days before taking possession of such merchandise, fixtures, or merchandise and fixtures, or paying therefore, notify personally, or by registered mail, every creditor whose name and address appears in said list, or of which he has knowledge, of the proposed sale and of the price, terms and conditions thereof. G. C. § 11102.

Sellers, transferrers and assignors, purchasers, transferees and assignees, under this act shall include corporations, association co-partnerships and individuals, but nothing contained in this act shall apply to sales by executors, administrators, guardians, receivers, trustees in bankruptcy or by any public officer under judicial process. G. C. § 11103.

Any purchaser, transferee or assignee, who shall not conform to the provisions of this act, shall at any time within ninety days after such sale upon application of any of the creditors of the seller, transferrer, or assignor become a trustee and be held accountable to such creditors for all the goods, wares, merchandise and fixtures that have come into his possession by virtue of such sale, transfer or assignment, provided, however, that any purchaser, transferee, or assignee, who shall conform to the provisions of this act shall not in any way be held accountable to any creditor of the seller, transferrer or assignor, for any of the goods, wares, merchandise or fixtures that have come into the possession of said purchaser, transferee or assignee by virtue of such sale, transfer or assignment. G. C. § 11103-1.

(11)

For a debt of $1200 which A owes to B, he delivered to B as collateral a certain stock certificate of the value of $1000. Shortly thereafter, C, another creditor, had garnishee process served upon the corporation to reach the interest of A therein. Several days thereafter the directors of the corporation declared a dividend of 10% on all stock. (a) Who is entitled to the dividend on A's stock? (b) Why?

(a) The pledgee is entitled to the dividend for the purpose of applying it to payment of the debt, owed him by the pledgor.

A pledgee is entitled to hold the profits and increase of the thing pledged as a part of his security, but these must be applied towards the payment of the debt secured. Of course, if the debt is paid in full from other funds, the pledgee must restore such profits and increase along with the thing pledged.

In the case of corporate stocks, not only is the pledgee entitled to the dividends (to be accounted for just as other profits), but it is usually held that, if the stock stands on the company's books in his name, the pledgee may vote it. Dobie on Bailments and Carriers, p. 216, 217.

Dividends in the hands of the corporation after process follow the stock and are subject to the same distribution. The pledgee has a preference over a subsequent attaching creditor of the pledgor, although the pledge has not been entered upon the books of the corporation, even though the creditor is without notice of the pledge. Under this rule, the attachment is valid only as against the interest of the pledgor after the pledgee's debt has been paid Norton v. Norton, 43 O. S. 509, 3 N. E. 348.

(b) The law presumes this lien of the pledgee to be part of the consideration for the original loan. See Dobie on Bailments, p. 216 et seq., and Norton v. Norton, 43 O. S. 509, 3 N. E. 348.

(12)

In the administration of an estate, which of the following are considered personal and which real property:

(a) Lease for oil and gas on the real estate of another;
(b) Choses in action;
(c) Fixtures in residence;
(d) Chattels real;
(e) Rails in a fence?

(a) Kerlin Brothers v. Toledo, 20 C. C. 603, 614. 11 C. D. 56, 66, 8 N. P. 62, 10 D. (N. P.) 509 reads as follows:

"While this court has held that gas and oil leases, for certain purposes and in certain aspects, including the right of the sheriff to sell upon execution, are to be treated as personalty, it is very doubtful whether, within the purview of G. C. § 4677, such leases could be regarded as personal property, since they involve rights and easements of an incorporeal nature."

However the better view appears to be that stated in Swan's Treatise, p. 629, namely, that "A leasehold estate (other than a permanent leasehold estate renewable forever) is chattel property."

(b) Choses in action are regarded as personal property. Blackstone, Vol. 2, p. 397.

(c) A fixture is an article once a chattel, but now a part of the REALTY and is regarded as real property. Teaff v. Hewitt, 1 O. S. 511. Fortman v. Goepper, 14 O. S. 558.

(d) Every species of property, moveable or immovable, which is less than a freehold is a chattel, or, in other words, is personal property. 1 Schouler Personal Property, 5th Ed., § 9.

(e) Rails in a fence are part of the realty though before annexation are personalty. Gray v. Hawkins, 8 O. S. 449.

(13)

(a) State comprehensively, but briefly what in legal contemplation is included within the term "personal property.

(b) What is included within the term "goods" as defined by the Uniform Sales Act?

(c) For what purposes in this state are permanent leaseholds renewable forever removed from the catagory of personal property and considered the same as real property?

(a) Blackstone defines personal property as that species of property which lacks the elements of immobility and indefinite duration. Things moveable or separate from the realty, interests in land less than freehold, and rights not yet reduced to possession, all constitute personal property. 2 Blackstone, 385-386.

(b) "Goods" include all chattels personal other than things in action and money. The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale. Shares of stock come within the definition "goods." G. C. § 8456; and Davis Co. v. Whitmore, 92 O. S. 44, 110 N. E. 518.

(c) Permanent leaseholds renewable forever are considered as real property for all purposes.

Where the owner of real estate makes a ninety-nine year lease renewable forever, the estate created by such instrument becomes a freehold estate in real property and becomes subject to the same laws of descent as an estate in fee. Such an estate is subject to dower under the provisions of G. C. § 8606. Ralston Steel Car Co. v. Annie M. Ralston, 112 O. S. 306.

Moreover it has been held that permanent leaseholds are realty for the purpose of taxation under G. C. § 5322. Cincinnati College v. Yeatman, 30 O. S. 276.

(14)

State the applicable rules of law with respect to the right to a growing crop of wheat: (1) As between the grantor and grantee in a conveyance of the land on which the crop is growing; (2) As between the owner who has mortgaged the land and the purchaser at the sale had on foreclosure of the mortgage; (3) As between a lessee of the land who put in the crop and the purchaser at the sale on foreclosure of mortgage executed by the owner of the land.

(1) The ownership of realty carries with it as an incident thereto, the prima facie presumption of ownership of

both natural products of the land, such as grass and trees, and the emblements, or annual sown crops, but such presumption is not conclusive. 17 C. J. 381.

The crop passes to the grantee with the land in Ohio, but may be orally reserved. The reason is because a deed is construed most strongly against him who makes it. Baker v. Jordan, 3 O. S. 438, Aff. and Fol. in Yomans v. Caldwell, 4 O. S. 71.

We do not question the proposition that in this state at least, growing crops may be reserved by a parol agreement from the operation of a deed for the real estate on which they are growing, notwithstanding the further fact that such crops will pass with a grant of the land as a part thereof in the absence of such reservation. This principle was established by the case of "Baker v. Jordan," and rests primarily upon the theory that such crops are regarded generally as personal property and if the parties to a deed treat such crops as personalty and contract by oral agreement accordingly, evidence of such agreement does not contradict the deed but is consistent therewith. Manifestly this rule may not apply where the deed by its express terms treats such crops as a part of the realty, and plainly and by language subject to no doubt, passes them with the realty to the vendee.. Crabtree v. Smith, 31 O. C. A. 593 at p. 594, 35 C. D. 477.

(2) The purchaser gets no title to such crop since only the title to the land passes. Mason v. Lemmon, 3 N. P. 116, 4 D. (N. P.) 322, Aff. without opinion 56 O. S. 793, 49 N. E. 1113.

(3) The lessee has the right to such crop as against the purchaser at the foreclosure sale. If mortgaged lands are leased, the tenant's crops do not pass at the foreclosure sale, but are protected. Cassilly v. Rhodes, 12 O. 88; Seybolt v. Burtner, 1 D. Repr. 225, 4 W. L. J. 551.

In Cassilly v. Rhodes at page 95, it is said: The mortgagor may lawfully lease subject to the mortgage; and when the mortgagee defeats the estate, either by entry or judicial sale, the annual crops are saved for the tenant, under the common law rule relating to emblements because the termination of the lease is uncertain. The elder jurists find abundant reason for the doctrine, in the protection the law owes to agriculture. And we may enlarge the basis by referring to our system of appraisals. The principle, which now extends to personalty, as well as to lands, is, that the subject of sale should be appraised, and not sold, except at a price bearing some proportion to its value. But where lands are valued for judicial sale, the value of the annual crops is not included in the estimate. Yet, if the crops passed, the purchaser would acquire property which had not been subjected to appraisal; and thus defeat the system of policy intended for the debtor's protection. The debtor's

rights, therefore, can be saved only by regarding the annual crops as personalty, requiring a separate levy.

(15)

(a) Define a chattel mortgage and state in what respects it is distinguished (1) from a pledge; (2) In what respect is a chattel mortgage distinguished from a conditional sale of personal property?

(b) State the nature of the respective rights and interests of the mortgagor and mortgagee in the property covered by a chattel mortgage; (1) Before condition broken; (2) After condition broken.

(a) A chattel mortgage is usually stated to consist of the passing of the title to personalty for the purpose of security only, subject to the provision that the title shall revest in the one giving the mortgage upon his satisfying the the terms on which it was given. Modern American Law, Vol. IV, p. 290.

(1) In the case of a chattel mortgage, title passes to the mortgagee while in the case of a pledge, possession passes but title does not. Modern American Law, Vol. IV, p. 290.

(2) It differs from a conditional sale in that in the mortgage, title passes at once to revest on the performance of a condition. In a conditional sale, title does not pass at once but is to pass on the performance of a condition. Modern American Law, Vol. IV, p. 314.

(b) (1) A chattel mortgage, in the usual form, conveys to the mortgagee, the property mortgaged and he thereby becomes at once, in law, the general owner of it; and in the absence of a provision in the mortgage giving the mortgagor the right of possession of the property, the mortgagee is entitled to the immediate possession. If there is such a provision as to possession in favor of the mortgagor, it affects only the possession according to the terms of the provision; for the title still remains in the mortgagee, and he is entitled to the immediate possession on breach of the condition, unless otherwise provided in the mortgage.

It is provided by statute in Ohio, G. C. §§ 12476, 12476-1, that a mortgagor is criminally liable if he, without the consent of the owner of the claim secured by the mortgage, removes any property from the county, or secretes it, or converts it to his own use with intent to defraud.

(2) There is an equitable right in the mortgagor, even after the breach of the condition, which entitles him to so much of the mortgaged property, or its proceeds on a fair sale, as may remain after satisfying the mortgage debt and the expenses of the sale. Root and McBride Bros. v. Davis, 51 O. S. 29, 36 N. E. 669.

When the mortgage debt becomes due, and the condition of the mortgage thereby becomes absolute, the mortgagee may bring a suit on the mortgage debt as if no mortgage had been made, and issue execution, on the judgment, and levy upon and sell the mortgaged or other goods of the mortgagor, or he may take possession of the mortgaged goods, or obtain possession after demand made, by an action of replevin, and then, if the parties cannot agree on a sale, it is safest for the mortgagee to sell the goods at auction, giving a like notice of the time and place of sale as is required by law in cases of sale on execution, or other reasonable notice, at the same time notifying the mortgagor of the time and place. If the mortgagee, at his own public sale bid off the property at less than its fair value, he must account for its fair value. Beard v. Westerman, 32 O. S. 29; Swan's Treatise, p. 635.

(16)

K, residing in the state of New York, took a chattel mortgage in proper form from one G, who resided at the same place, conditioned to secure the balance of the purchase price, of an automobile which was the subject of the mortgage, and the mortgage was filed for record and duly registered in the proper office in said state of New York. G. shortly thereafter, before breach of the condition of mortgage, came to Ohio with the automobile, without the knowledge or consent of K, and there by proper form of law sold the automobile to one T for a sum of money representing the full value of the automobile. T at the time of his purchase did not know or have any means of knowing anythnig about said chattel mortgage. The conditions of said mortgage having become broken, by non-payment of balance of purchase price thereof, K located the machine in Ohio and after demand therefor brought replevin against T to recover the automobile. The proceedings are in proper form and in the proper court. Should K prevail in said action? Give reasons for answer.

K should prevail.

"Where personal property has been mortgaged in another state, and the mortgage there duly recorded under a statute similar to that of Ohio, and the property is afterward removed to Ohio and there sold to a bona fide purchaser without notice, the mortgagee may notwithstanding, enforce his mortgage against the property." John Kanaga v. Jonah R. Taylor, 7 O. S. 134.

The statute law of New York, in regard to the record of chattel mortgages, is, in the object and spirit of it almost identical with ours. Mortgages or bills of sale of personal property, intended to operate as such, must be accompanied by an immediate delivery and be followed by an actual, continued, change of possession of the thing mortgaged, or the

instrument deposited with the clerk of the county where the mortgagor resides, or if a non-resident, where the property shall be at the time of its execution, else, by the law of Ohio, the mortgage is void as against the creditors of the mortagagor, and as against subsequent purchasers and mortgagees in good faith. The law of New York is founded in the same policy, and contravenes no rights of our citizens and is not at variance with any law nor in violation of any principle of our government, either civil, political or moral. Had the same mortgage been executed and filed for record here, it would be our duty to give it effect and protect the parties in their rights under it. The registry of such instruments is required to be made at the place of the transaction, or where the mortgagor may reside, in order to convey notice to others who may wish to become interested as purchasers or lien holders in the same property. .It gives to the public the means of learning what has been transacted in relation to the incumbrance of property, and of deriving benefit, from a knowledge of it, which, in the absence of such salutory regulation, would be the secrets only of the immediate parties interested, and might lead to the perpetration of frauds upon innocent persons. When that act is done which is necessary to give validity to the contract, at the time, and in the place and manner pointed out, the whole duty, in regard to it, is at an end. It is not made necessary to go into other counties, nor into other states, to procure new registrations. The law, has for wise purposes, omitted any such requirement. Holding this instrument, then, as the plaintiff did, as a legal and valid one, by the law in force where he obtained it, he was entitled to enforce it; but as the power to do that, had been cut off by the removal of the property beyond the jurisdiction of the state, it was proper for him to sue in the courts of Ohio.

G had no power to confer any better title than he held; and those who purchased from him, were bound by the rule of caveat emptor. 7 O. S. 134 at p. 141.

(17)

In a certain transaction, a buyer bought and paid for certain specific goods in the hands of the seller and thereby the property in the goods passed to the buyer. The seller on demand made by the buyer therefore, wrongfully refused to deliver the goods to the buyer. In this situation, what are the rights and remedies of the buyer against the seller?

"Where the property in the goods has passed to the buyer and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain any action allowed by law to the owner of goods of similar kind when wrongfully converted or withheld." G. C. § 8446.

This would be an action for replevin. G. C. § 12052.

Where the seller, without justification, refuses to deliver the article sold, the buyer may rescind the contract, and recover any payments made upon the purchase price, in an action for money had and received. The K. B. Co. v. Dixon, 19 C. C. (N. S.) 196, 32 C. D. 426.

"When the seller has broken a contract to deliver specific or ascertained goods, a court having the powers of a court of equity may, if it thinks fit, on the application of the buyer, by its judgment or decree, direct that the contract shall be performed specifically, without giving the seller the option of retaining the goods on payment of damages. The judgment or decree may be unconditional, or upon such terms and conditions as to damages, payment of the price and otherwise, as to the court may seem just. G. C. § 8448.

Under G. C. § 8448, specific performance of a contract to deliver specific goods may be granted if the buyer demands it and it is equitable. Hughbanks v. Browning, 9 App. 114.

(18)

Omitting caption and verification, draw a petition in an action in replevin for the recovery of personal property and damages for its detention.

Petition in Replevin
(caption)

Plaintiff says that he is the owner and is entitled to the possession of the following goods and chattels:

(Describe the goods and chattels)

That defendant wrongfully detains said goods and chattels from plaintiff and has so detained said goods and chattels ever since the.....day of.....19.... to plaintiff's damage in the sum of $.....

Wherefore plaintiff prays for the recovery of said goods and chattels and $.....damages for their detention against defendant.

.....
Attorney for Plaintiff.

(Verification, which must be sworn to positively)
(Precipe for summons)

Baldwin's Civil Practice Manual of Ohio, Forms Nos. 30, 72, 428.

(19)

(a) Define Personal Property.
(b) What is a chattel real?

(a) Blackstone defines personal property as that species of property which lack the elements of immobility and indefinite duration. 2 Blackstone, p. 385, 386.

Things moveable or separate from the realty, interests in land less than freehold and rights not yet reduced to pos-

session, all constitute personal property. 2 Blackstone, p. 385, 386.

(b) A chattel real is an interest issuing out of, or annexed to real estate, of which it has one quality—viz: immobility, which denominates it real; but wants the other—viz: a sufficient, legal indeterminate duration; and this want is what constitutes them chattels. 2 Blackstone, p. 386, 387.

All interests in lands which are less than freehold, are chattels real. Estates for years and estates from year to year are examples. 2 Blackstone, p. 386, 387.

Real chattels are interests which are annexed to or concern real estate; as, a lease for years of land. Bouvier's Law Dictionary, Baldwin's Revision.

Personal chattels are things movable which may be carried about by the owner. Bouvier's Law Dictionary, Baldwin's Revision.

(20)

The Greenwich Rubber Co. became bankrupt. The electric motors which composed the power plant of the company had been sold to it upon a conditional contract. The trustees for the bankrupt claimed that the power plant was part of the realty and asked that it be sold with the plant as realty. What is it—personal property the title to which remained in the vendor under his conditional sales contract? or was it realty? Give reason or citation for your answer.

Personalty.

The machinery of a manufactory that supplies the motive power as the engine boiler, and their usual attachments, as contradistinguished from that propelled by it, where permanently annexed to foundations resting on the freehold, is generally held to be a fixture. Case Mfg. Co. v. Garven, 45 O. S. 289, 13 N. E. 493.

But there are four rules governing fixtures, namely:

(1) Contract of the parties;
(2) Manner of annexation;
(3) Nature of subject matter;
(4) Effect of removal.

In the present case, the contract of the parties was a conditional sale.In the case of a conditional sale, title remains in the vendor (G. C. § 8568). Hence the intention of the parties must have been to regard the subject matter of the contract as personalty or they would not have made a conditional sale. A trustee in bankruptcy is in privity with the bankrupt and can only assert whatever title he had. Therefore the trustee could not assert ownership since the condition had not been performed and no title passed.

If it be assumed that the conditional sale was not recorded, the assignee in bankruptcy of the vendee would prevail over the vendor, because G. C. § 8568-70 provide that

such a sale if not recorded shall be "void as to creditors." Assignee of Cook, 6 N. P. (N. S.) 298. 18 D. 541. Jacob Baum v. Joseph Harrison assignee, 9 N. P. (N. S.) 257, 20 D. 374.

(21)

(a) Can one acquire title to a stolen horse, though he be an innocent purchaser?

(b) Can he acquire title to a stolen unregistered government bond, though he be an innocent purchaser?

(a) No.

No one can pass to a buyer a better title than he himself possesses. "Nemo dat quod non habet." A person, therefore, however innocent, who buys goods from one not the owner, obtains, in general, no property in them whatever. Tiffany on Sales, p. 27.

"Subject to the provisions of this act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell." G. C. § 8403.

(b) Yes.

In the case of negotiable securities which are stolen, a bona fide holder or an innocent purchaser before maturity for value is protected, and the owner has no title against such purchaser. 5 Cyc. p. 800 § 6.

As to negotiability of unregistered government bonds, see §§ 214 and 214 (a) of Ogden on Negotiable Instruments, 1922 Edition.

(22)

(a) What, if any, written instrument is necessary to pass the title to chattels?

(b) What, if any, written instrument is necessary to prove the purchase or sale of chattels?

None. If the chattels are unascertained no title can pass until they are ascertained. G. C. § 8397.

If the chattels are ascertained, the title passes whenever the parties intend it to pass. No delivery is necessary. G. C. § 8398.

This is assuming that no specific statute is involved as in the case of automobiles (Atwood Law) requiring duplicate copies of bill of sale to be made and one of them to be filed with the clerk of the common pleas court, (§ 6310 et seq.) or shares of stock in a corporation requiring an indorsement on the back of the share, accompanied by delivery, or a separate assignment in writing accompanied by delivery of the share of stock. G.C. § 8673-1.

(b) None.

Possession is prima facie evidence of ownership, and oral testimony is generally sufficient, but G. C. § 8384 provides as follows: A contract to sell or a sale of any goods or choses in action of the value of $2500 or upward shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold, or sold, and actually receive them, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf.

(23)

(a) What is the good will of a manufacturing plant? Is it property? If so, is it personalty or realty?

(b) Is it attached to the property, or the realty, so that it may not be severed or sold separately?

(a) The good will of a business represents the momentum of organization possessed by a "going concern," with the advantage of an established location, name and reputation. Gilmore on Partnership, p. 49.

The real and substantial essence of good will—the thing which leads people to buy it and pay money for it is the hope of expectation that the buyer will thereby acquire an established business or source of business instead of being compelled to devote time and money to developing a business de novo. Mechem's Elements of Part, § 127, p. 115.

Good will is not of itself, property, but is only an incident that may attach to, or be connected with property (64 N. E. 661).

It is intangible personal property.

(b) No, it may be severed and sold separately.

Good-will is part of the assets of a partnership business and may be sold and transferred. Gilmore on Partnership, p. 49.

The good-will is regarded as a valuable incident of the business and may be sold or transferred as such. Mechem's Elements of Partnership § 127, p. 114.

(24)

(a) What kind of an action may be brought to secure possession of specific personal property?

(b) State briefly the pleadings, instruments and steps necessary to secure possession of specific personal property through the common pleas court.

(a) Replevin. G. C. § 12051.

(b) File a petition in the common pleas court (for contents, see Wilmot v. Lyon, 11 C. C. 238; 7 C. D. 394) and also a praecipe. An affidavit is then filed with the clerk of court containing (1) a description of the property; (2) that the plaintiff is the owner, or has an interest therein;

(3) that the property is wrongfully detained; (4) that the property is not taken from plaintiff on process or for a tax. See G. C. § 12052.

An order to the sheriff is then given to seize the property. A bond must be given in double the value of the property in order to prosecute the action, and in order to pay whatever may be awarded against the plaintiff; but if the property is an heirloom, keepsake, or relic, etc., the sheriff, on notice from the defendant, retains possession. See G. C. §§ 12053-12054.

(25)

A dies intestate, leaving 100 shares of stock in the Columbus Land Company, a corporation dealing in real estate. Is the stock real or personal property?

Personal property.

The weight of authority, we believe, is in favor of the proposition that shares of stock constitute property distinct from the capital or property of the company. This court, in cases elsewhere cited, has recognized such distinction. The capital or property of the company may be largely real estate, while the shares are, in their nature, personalty. Ins. Co. v. Raterman, 46 O.S. 153, 161; Bradley v. Bauder, 36 O.S. 28, 35; Johns v. Johns, 1 O.S. 350, 357.

(26)

A contracts to sell B 1,000 tons of coal at an agreed price, for use in B's factory. A coal and railroad strike makes it difficult to buy coal on the open market. A has enough coal on hand to satisfy his contract with B, but refuses to comply with his contract. B begins an action in specific performance against A. Who prevails?

B prevails.

When the seller has broken a contract to deliver specific or ascertained goods, a court having the powers of a court of equity may, if it thinks fit, on the application of the buyer, by its judgment or decree direct that the contract shall be performed specifically, without giving the seller the option of retaining the goods on payment of damages. The judgment or decree may be unconditional, or upon such terms and conditions as to damages, payment of the price and otherwise, as to the court may seem just. G.C.§ 8448; Hughbanks v. Browning, 9 App. 114.

(27)

A, an insolvent debtor, assigns certain notes to B, a creditor, and places the notes in a letter addressed to B, but neglects to mail the letter. A dies a week later. B obtains the notes after A's death. Did B get title to the notes?

No.

There was no delivery. Delivery is essential to the validity of an assignment. Leonard v. Kebler, 50 O.S. 444.

(28)

A contracts to sell a parcel of land to B for $50,000, on January 1, 1926, and receives $25,000 on the purchase price, which he deposits in his bank account. A dies on February 1st, 1926, without having conveyed the land. A's will leaves all of his property to his son and all of his personal property to his daughter.

(a) Who gets the $25,000 in the bank?
(b) Who gets the balance of $25,000 due on the land?

(a) The daughter.
(b) The daughter.

Under a contract for sale of real estate, in which the vendor agrees to transfer the property named, by deed of general warranty upon full payment of the purchase price, and the vendee is placed in possession, there is an equitable conversion, the vendor's interest in the property changing from real estate to personalty at the time the contract is executed and passing, in case of the vendor's death before payment is completed, to his personal representative as personalty. Swartzel v. Snyder, 26 N.P.(N.S.) 449.

(29)

A contracts with B to buy 1,000 yards of silk from B, and on receiving the silk and examining it, ascertains that it is of an inferior quality and does not conform to their contract. A retains the silk and writes B that he will return the silk if B will send him other silk.

B ignores A's letter and commences suit for the purchase price. Who prevails?

A prevails.

Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he notifies the seller that he refuses to accept them. G.C.§ 8430.

Where a party under contract to manufacture and deliver certain specific goods, delivers to the buyer goods of a kind not conforming to the contract, and, upon examining them and without delay the buyer informs the seller of that fact and unequivocally refuses to accept or use the goods, and does not use any of them, it is not incumbent on such buyer to manually return such rejected goods nor in words to offer to return them. It is sufficient to relieve him of liability to pay for them if he, in due time, gives the seller clearly to understand that he refuses to accept the goods. Rheinstrom v. Steiner, 69 O.S. 452.

(30)

A contracts for coal for his factory. The coal company fails to deliver, and A, unable to get the kind of coal he had contracted for, except at a much higher price, is compelled to buy coal of an inferior quality to operate his plant. As a result he sustains a financial loss because of a diminished output. He sues the coal company asking for damages. Can he recover his loss because of the diminished output? If not, what is his measure of damages?

No.

The measure of damages for breach of contract to furnish coal to a factory is the difference in price under the contract for the grade of coal designated therein and the prevailing price in the market, at the time, for the same grade of coal; it does not include loss from diminished output of the factory occasioned by the use of inferior coal because of the increased price of the same grade of coal on the market. Hinde & Dauch Paper Co. v. Wainwright Coal Co., 19 D. 139; see also G.C.§ 8447.

The recovery of damages for breach of contract is governed in Ohio by the well-known rule laid down in Hadley v. Baxendale (9 Exch. 341):

Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in the respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i. e., according to the usual course of things from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of it. Champion Ice Co. v. Iron Works Co., 68 O.S. 229, 234; Paper Co. v. Coal Co., 19 D. 139, 140.

(31)

John Brown let Lucy Walters have $500 as a gift, in the expectation by both parties of marriage. The gift was made to buy the necessary wardrobe for the said Miss Walters. The said Walters broke the engagement. Can the money be recovered by Brown? Give reason for answer.

No.

This was a valid gift inter vivos.

The essentials of a gift inter vivos are the purpose of the donor to make the gift and a delivery of the thing given, which delivery may be actual, constructive, or symbolical; it is immaterial which, so long as it divests the donor of all dominion and invests the donee with dominion. Obrien v. Obrien, 112 O.S. 202, 206.

A gift inter vivos has been defined as an immediate, voluntary and gratuitous transfer of his personal property, by one to another. It is essential to its validity that the

transfer be executed, for the reason that there being no consideration therefor, no action will lie to enforce it. A gift inter vivos has no reference to the future, but goes into immediate and absolute effect. Flanders v. Blandy, 45 O.S. 108, 113.

(32)

A brings a Ford car to B's garage to be repaired. The repairs amount to $15. A few weeks earlier A had borrowed $20 from B. A calls for his car and B refuses to give A his car unless A pays the total amount of $35. What are the rights of each?

A has only to tender $15; if B then refuses, A can replevin.

As a general rule a bailee is not entitled to a lien upon the property for a general balance of account. 6 C.J. 1135, § 83(b), citing Owen v. Duhme, 3 D. Repr. 303.

(33)

Under what property classification does petroleum belong?

Petroleum oil is a mineral, and while it is in the earth, it forms a part of the realty; and when it reaches a well and is produced on the surface, it becomes personal property, and belongs to the owner of the well. Kelley v. Ohio Oil Co., 57 O.S. 317; Pure Oil Co. v. Kindall, 116 O.S. 188, 201.

(34)

A was the owner of a tract of timber land. B, who had a contract to furnish X a certain amount of oak timber, went with A to the land and there selected ten certain oak trees then growing on the tract. A and B there entered into a verbal contract of sale of those trees, B agreeing to cut and remove them within fifteen days. When B called to cut the trees, A refused to carry out the contract.

Does B have any remedy? If so, why? If not, why?

No.

A sale of standing timber, whether or not the parties contemplate its immediate severance and removal by the vendee, is a contract concerning an interest in lands, within the meaning of the statute of frauds, and is voidable by either party if not in writing. Hirth v. Graham, 50 O.S. 57; app. in Weir v. Saw Mill Co., 88 O.S. 424, 428; Handle & Golf Co. v. Gebhart, 26 N.P.(N.S.) 328, 330.

(35)

A died testate. A bequeathed to B, his son, "All the personal property of every kind, nature and description of which I die possessed." The estate consisted of—

1. 120 acres of land;

2. Building block upon which there was a 25 year lease with an annual income of $3,000;

3. Ten shares of preferred stock of the Grand View Realty Company;

4. A judgment of $6,000 upon which levy was made on certain real estate, the judgment debtor having no personal property to satisfy the judgment;

5. Share in crops which had been harvested but not sold;

6. Balance due on timber which had been cut and sold but remained on the land.

What part of the estate did the son receive under the bequest?

The son received everything but the 120 acres of land.

A lease for years is a chattel interest. Mills v. Connor, 104 O.S. 409, 417.

Stock in a realty company is personalty. Johns v. Johns, 1 O.S. 350, 357; Ins. Co. v. Ratterman, 46 O.S. 153, 161.

The representative becomes entitled to a judgment in favor of decedent. 23 C.J. 1130, § 323(5).

The emblements or annual crops raised by labor, whether severed or not from the land of the deceased, at the time of his death, shall be assets in the hands of the executor or administrator, and be included in the inventory. G.C.§ 10642.

All debts, claims, and surviving rights of action of decedent, of every kind, reducible to money, vest in the executor or administrator, to be collected or sued upon or transferred for the benefit of the estate. 23 C.J. 1130, § 323(5).

(36)

B is a sub-contractor and agrees in writing to furnish certain building material to A, the principal contractor, for the sum of $25,000.

B has agreed that if prompt deliveries are not made, A is privileged to go into the market and obtain such materials at the market price and that B will pay to A any difference in cost between the $25,000 and the market price;

B fails to make any deliveries.

A continues to wait for the materials and notifies B that he insists upon delivery and will look to him for any damages;

A is under contract with C which provides that C can cancel the contract if A does not expeditiously and without unnecessary delay complete the building;

C cancels the contract;

B had full knowledge of the terms of the contract;

A suffered a loss of $50,000 by reason of the cancellation;

A or B could have gone into the market and purchased building materials required at $26,000 and obtained immediate delivery;

A desires to begin action against B:

What rights has A?

A has a right of action against B for $1,000 only.

1. When the property in the goods has not passed to the buyer, and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain an action against the seller for damages for non-delivery.

2. The measure of damages is the loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract.

3. When there is an available market for the goods in question, the measure of damages, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver. G.C.§ 8447.

(37)

Jones sold Smith a factory, taking back a real estate mortgage for the part of the purchase price. The purchase agreement stated that all machinery placed on the premises should become part of the realty. Smith later purchased machinery from the Standard Machine Co. and affixed the machinery to the real estate in the ordinary manner, but gave the Standard Machine Co. a chattel mortgage back for part of the purchase price of the machinery; both real estate mortgage and chattel mortgage duly recorded at the time each was given. Smith defaulted in his real estate mortgage to Jones, and the mortgage was foreclosed. The Standard Machine Co.'s mortgage being also unpaid, they made a claim for the machinery covered by their mortgage. Who is entitled to the machinery?

The Machine Co.

In a similar case the court said: The mortgage (real estate) of Waight and Ames cannot be a lien on the machinery sold by the York Mfg. Co., because the mortgage was prior to the time when any portion of such machinery was put upon the land. There was no clause in the mortgage covering after-acquired property, and in any event, the mortgage would not cover property so acquired, the title to which, as in this case was reserved to the vendor. York Mfg. Co. v. Cassell, 15 O.F.D. 238, 241, 242, 4 L.R. 327, 332.

The interest of a mortgagee under a chattel mortgage is that of general owner of the property mortgaged. Robinson v. Fitch, 26 O.S. 659.

(38)

In the sale of personal property, what are the implied warranties?

In a contract to sell or a sale, unless a contrary intention appears, there is—

1. An implied warranty on the part of the seller that in the case of a sale he has a right to sell the goods, and that in the case of a contract to sell he will have a right to sell the goods at the time when the property is to pass.

2. An implied warranty that the buyer shall have and enjoy quiet possession of the goods as against any lawful claims existing at the time of the sale.

3. An implied warranty that the goods shall be free at the time of the sale from any charge or incumbrance in favor of any third person, not declared or known to the buyer before or at the time when the contract or sale is made.

4. This section shall not, however, be held to render liable a sheriff, actioneer, mortgagee or other person professing to sell by virtue of authority in fact or law, goods in which a third person has a legal or equitable interest. G.C.§ 8393. There are many other implied warranties, such as in cases of sale by description, for a particular use, by sample, etc. See G.C.§§ 8394, 8395, and 8396.

(39)

A is the owner of an automobile upon which he has executed a chattel mortgage to the Strong Finance Co., which mortgage is properly recorded. A's car is damaged in a wreck and he calls the Central Garage Co. to remove his car from the place of wreckage to the garage and to make the necessary repairs on the same. The Central Garage has no knowledge of the chattel mortgage and A represents that the automobile is free from encumbrance. The Central Garage makes the necessary repairs and A refuses to pay the bill, claiming that it is excessive. The Central Garage Co. holds the car to secure payment of its bill for repairs. The Strong Finance Co. thereupon commences an action against the Central Garage Co. to replevy the car and the Central Garage Co. sets up as its defense to the action a claim of lien for work and labor. Is this a good defense? Reasons.

No.

An artisan who furnishes materials or performs labor for the building or repair of chattel property has a valid common law lien upon such chattel property for the reasonable value of such labor and materials while he retains such chattel property in his possession.

But where such chattel property is incumbered by a valid chattel mortgage, properly executed and filed, according to the Statutes of Ohio in such cases made and provided (G.C.§§ 8560, 8561), such record is constructive notice to persons who thereafter perform labor or furnish materials in repairing such chattel property, and the common law lien of such artisan is subordinate to the lien of the mortgagee thereon. Metropolitan Sec. Co. v. Orlow, 107 O.S. 583, 140 N.E. 306.

(40)

You are the prosecuting attorney of your county. The auditor of the county advises you that the corporation furnishing gas to a large manufacturing concern has failed to include the gas pipes laid by it to a manufacturing plant in its tax return, and the manufacturing company has likewise refused to incorporate the value of the gas pipes in its return for taxation. The gas company claims that the pipes, for the purpose of taxation, constitute real property. The manufacturing company claims, for the purpose of taxation, that the gas pipes are chattels.

Against which concern would you institute an action to enforce payment of taxes? Assign reasons.

Against the manufacturing company.

The weight of authority appears to favor the view that pipes used to supply gas to consumers are not assessable for local taxation, either as land or as a part of the company's capital stock; but it has been ruled that since such pipes are annexed to the freehold they are fixtures, and may be assessed as real estate. 12 R.C.L., p. 885, § 25.

Pleading

(Numbers in parenthesis refer to answers following.)

I. FORM AND ALLEGATIONS IN GENERAL.

A. Nature and Form of Pleading in General. (4, 11, 15, 31a)

Pleading, 4 to 11.

G.C.§§ 11237 to 11240, 11302 to 11304; 16 O.S. 552; 45 O.S. 43; 57 O.S. 271; 65 O.S. 104; 71 O.S. 480; 27 App. 137; 23 D. 253.

B. Construction in General. (5c, 6, 29)

Pleading, 14 to 21.

G.C.§ 11345; 42 O.S. 625; 49 O.S. 374; 84 O.S. 74; 110 O.S. 422.

C. Title or Caption and Prayer. (5d)

Pleading, 25 to 36.

G.C.§§ 11304, 11305(2); 30 O.S. 374; 31 O.S. 80; 107 O.S. 577.

D. Certainty and Definiteness.

Pleading, 40 to 44.

W. 636; 9 N.P.(N.S.) 289; 19 N.P.(N.S.) 560; 21 N.P.(N.S.) 345.

E. Facts Admitted; Negative Pregnant. (3b, 7, 12, 30)

Pleading, 65 to 68, 177 to 179.

G.C.§§ 11329, 11331, 11359; 39 O.S. 112; 102 O.S. 69; 103 O.S. 508; 110 O.S. 576.

F. Conclusions of Law or Legal Conclusions. (9a)

Pleading, 71, 72.

29 O.S. 13; 34 O.S. 467; 37 O.S. 402; 44 O.S. 51; 80 O.S. 282.

II. PARTIES TO ACTION; JOINDER OF PARTIES. (21, 22, 23, 34)

Parties, 1 et seq.

G.C.§§ 11235, 11241 to 11267, 11318, 11367, 11903, 12305; 66 O.S. 316; 67 O. S. 316; 72 O.S. 224; 21 App. 314; 25 App. 546.

III. WHERE ACTION TO BE BROUGHT.

Venue, 3 et seq.

G.C.§§ 6308, 10770, 11268 to 11278, 11416, 11980; 110 O.S. 636; 112 O.S. 567; 25 App. 175.

IV. PETITION, SUFFICIENCY AND FORM. (4c, 7, 8, 9, 18, 20, 25, 27, 30)

Pleading, 1, 48 to 62, 75 to 99. (For petitions in particular cases see Bates' Digest subdivision "Pleading" under each particular subject.)

[*References are to Bates' Compact Ohio Digest.*]

G.C.§ 11305, 118 O.S. 285, 26 App. 420; Account, G.C.§ 11334; Condition Precedent, G.C.§ 11339; Contract, G.C.§ 11334; Description of Realty, G.C.§ 11344; Ejectment, G.C.§ 11903; Judgment, G.C.§ 11338; Libel and Slander, G.C.§ 11341; Mandamus, G.C.§ 12286; Negligence, 66 O.S. 326, 29 O.C.A. 271; Partition, G.C.§ 12028; Promissory Note, G.C.§ 11334; Replevin, G.C. § 12052.

V. SEPARATELY STATING AND NUMBERING.

Pleading, 103 to 105.

G.C.§§ 11308, 11316.

VI. JOINDER OF CAUSES OF ACTION. (26, 32)

Pleading, 108 to 129.

G.C.§§ 11254 to 11258, 11306, 11307; 24 O.S. 232; 29 App. 310.

VII. ANSWER, CROSS-PETITION AND AFFIDAVIT OF DEFENSE.

A. Requisites of Answer; Defenses. (10, 17, 19, 27, 28)

Limitations of Actions, 200 to 209; Pleading, 133 to 148, 184 to 186.

G.C.§ 11311 to 11315, 11322, 11342; 17 O. 362; 10 O.S. 452; 24 O.S. 621; 25 O.S. 276; 34 O.S. 467; 19 App. 399; 13 C.D. 475.

B. Dilatory Pleas, Plea in Bar and in Abatement. (1b, 4a, 16)

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C. Set-off, Counterclaim and Cross-Petition. (31)

Pleading, 159 to 161; Set-off and Counterclaim, 1 et seq.

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D. Pleading Different Pleas or Defenses Together.

Pleading, 164 to 167.

G.C.§ 11315; 30 O.S. 600; 21 C.D. 204; 31 C.C. 204; 5 O.F.D. 637.

E. Traverses or Denials.

Pleading, 171 to 179.

19 O.S. 110; 26 O.S. 130; 82 O.S. 161; 24 N.P.(N.S.) 573; 25 N.P.(N.S.) 76; 5 C.D. 665; 21 C.D. 204; 2 O.F.D. 282; 10 O.F.D. 654.

VIII. REPLY.

Pleading, 197 to 212.

G.C.§§ 11303, 11326, 11349, 11368, 12293, 12315; 25 O.S. 276.

IX. DEMURRER.

A. Requisites and Effect. (3a, 12, 35)

Pleading, 218 to 248.

G.C.§§ 11323, 11327, 13623; 29 O.S. 345; 28 App. 492.

B. Demurrer to Part of Pleading.

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G.C.§§ 11313, 11325; 27 O.S. 366; 30 O.S. 308.

C. Grounds for Demurrer. (4, 13, 32, 34)

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XI. SIGNATURE TO AND VERIFICATION OF PLEADINGS. (29c, 34)

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XII. PROFERT, OYER AND EXHIBITS. (1)

Pleading, 377 to 382.

G.C.§§ 11333, 11334; 14 O. 257; 27 O.S. 421; 10 D. 397; 13 C.C. 529.

XIII. FILING, SUMMONS, SERVICE, WITHDRAWAL. (29d, 33)

Pleading, 385 to 388; Process, 1 et seq.

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XIV. MOTIONS. (2, 3a, 14, 33, 34)

Pleading, 392 to 450.

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XV. ISSUES, PROOF AND VARIANCE BETWEEN ALLEGATIONS AND PROOF. (8, 30)

Pleading, 453 to 467.

G.C.§§ 11556 to 11558; 45 O.S. 657; 92 O.S. 201; 19 C.C. 687; 19 C.C.(N.S.) 433; 8 C.D. 225.

XVI. DEFECTS AND OBJECTIONS, WHEN CURED; WAIVER AND AIDER BY VERDICT OR JUDGMENT.

Pleading, 470 to 481.

30 O.S. 133; 31 O.S. 555; 39 O.S. 141; 102 O.S. 45; 2 O.F.D. 638.

Definitions

PETITION.—The first pleading shall be the petition by the plaintiff, which must contain:

1. A statement of facts constituting a cause of action in ordinary and concise language;
2. A demand for the relief to which the plaintiff claims to be entitled. If the recovery of money is demanded, the amount shall be stated; and if interest in claimed, the time for which interest is to be computed shall be stated.

Throckmorton's General Code of Ohio, § 11305.

ANSWER.—The answer shall contain:

1. A general or specific denial of each material allegation of the petition controverted by the defendant;

2. A statement in ordinary and concise language of new matter constituting a defense, counterclaim or set-off;
3. When a defendant seeks affirmative relief therein, a demand for such relief.

Throckmorton's General Code of Ohio, § 11314.

REPLY.—When the answer contains new matter, the plaintiff may reply to it, denying generally or specifically each allegation controverted by him. He also may allege, in ordinary and concise language, new matter, not inconsistent with the petition, constituting an answer to such new matter. Throckmorton's General Code of Ohio, § 11326.

COUNTER-CLAIM.—A counter-claim is a cause of action existing in favor of a defendant against a plaintiff or another defendant, or both, between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action. Throckmorton's General Code of Ohio, § 11317.

SET-OFF.—A set-off is a cause of action existing in favor of a defendant against a plaintiff between whom a several judgment might be had in the action, and arising on contract or ascertained by the decision of a court. It can be pleaded only in an action founded on contract. Throckmorton's General Code of Ohio, § 11319.

MATERIAL ALLEGATION.—A material allegation in a pleading is one which could not be stricken out without leaving it insufficient. Throckmorton's General Code of Ohio, § 11330.

MOTION.—A motion is an application for an order, addressed to a court or judge, by a party to a suit or proceeding, or one interested therein. Throckmorton's General Code of Ohio, § 11370.

RULE DAY.—The answer or demurrer to the petition shall be filed on or before the third Saturday, the reply or demurrer to the answer, on or before the fifth Saturday, and the demurrer to the reply, on or before the seventh Saturday, after the return day of the summons or service by publication. The answer or demurrer of a defendant to an answer demanding affirmative relief shall be filed on or before the third Saturday, the reply or demurrer thereto on or before the fifth Saturday, and the demurrer to the reply, on or before the seventh Saturday, after such answer is filed. Throckmorton's General Code of Ohio, § 11346.

OHIO STATE BAR EXAMINATIONS

QUESTIONS WITH ANSWERS

[*Arranged Chronologically.*]

(1)

(a) Give the occasion and for what purpose the following writs are allowable: Prohibition, Mandamus, Injunction, Error, Quo Warranto, Habeas Corpus, Replevin, Garnishment and Attachment.

(b) What is a plea in bar? A plea in abatement? When and how used?

(a) 1. The writ of prohibition is an extraordinary judicial writ issuing out of a court of superior jurisdiction and directed to an inferior court for the purpose of preventing the inferior tribunal from usurping the jurisdiction with which it is not judicially vested. Zumstein v. Tafel, 4 N. P. 314, 6 D. 484.

The writ of prohibition is a remedy brought into the jurisdiction of Ohio by amendments to the constitution, which became effective January 1, 1913. Original jurisdiction in prohibition is vested in the Court of Appeals and Supreme Court by Article IV, Section 6 and Article IV, Section 2 of the Ohio Constitution respectively. No statutory provisions have as yet been enacted laying down rules of procedure for the exercise of this jurisdiction. Cases of prohibition have however, been entertained both in the Court of Appeals and Supreme Court.

The power to award writs of prohibition having been conferred on the Supreme court by the constitution and that instrument having provided that no law shall be passed or rule made whereby any person shall be prevented from invoking the original jurisdiction of this court, the power will always be exercised where it clearly appears that a court or tribunal, whose action is sought to be prohibited has no jurisdiction of the cause, or is about to exceed its jurisdiction. State ex Rel. v. Brough, 94 O. S. 115, 113 N. E. 683.

The writ of prohibition will not be ordinarily allowed until the question of jurisdiction has been made and overruled in the court or tribunal, whose jurisdiction is challenged." In Re Oldham, 2 App. 457, 19 C. C. (N. S.) 270, 26 C. D. 153.

(2) Mandamus is the writ issued in the name of the state, to an inferior tribunal, a corporation, board, or person, commanding the performance of an act which the law specially enjoins as a duty, resting from an office, trust, or station." G. C. § 12283.

(3) The injunction provided by this title is a command to refrain from, or do a particular act. It may be the final judgment in an action, or be allowed as a provisional remedy. When so allowed, it must be by order. G. C. § 11875.

(4) Error is a proceeding designed to bring up questions of law only, for revision in the court above.

Proceedings in error are entirely statutory. Pace v. Volk, 85 O. S. 413, 98 N. E. 111.

A proceeding in error properly forms no part of the original action, but in its character is a new action before another tribunal to review and reverse the judgment or order rendered below. Foster v. Borne, 63 O. S. 169, 58 N. E. 66.

"In every stage of an action, the court must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party. No judgment shall be reversed, or affected, by reason of such error or defect. In the judgment of any reviewing court upon any petition in error in any civil action, when it is sought to reverse any final judgment or reduce or obtain a new trial upon the issues joined in the pleadings, such reviewing court shall certify on its journal whether or not in its opinion substantial justice has been done the party complaining, as shown by the record of the proceedings, and judgment under review. In case such reviewing court shall determine and certify that in its opinion substantial justice has been done to party complaining as shown by the record, all alleged errors occurring at the trial shall by such reviewing court be deemed not prejudicial to the party complaining and shall be disregarded and such judgment or decree under review shall be affirmed, or it shall be modified if in the opinion of such reviewing court a modification thereof, will do more complete justice to the party complaining. In case such reviewing court shall determine and certify that in its opinion, substantial justice has not been done to the party complaining as shown by the record, such reviewing court shall proceed as provided in G. C. § 12272." G C. § 11364.

(5) Quo warranto is the name of a writ (and also of the whole pleading) by which the government commences an action to recover an office or franchise from the person or corporation in possession of it. Bouvier's Law Dictionary, Baldwin's Revision.

A civil action in quo warranto may be brought in the name of the state:

(1) Against a person who usurps, intrudes into, or unlawfully holds or exercises, a public office, civil or military, or a franchise, within this state, or an office in a corporation created by authority of this state.

(2) Against a public officer, civil or military, who does or suffers an act which, by the provisions of law, work a forfeiture of his office;

(3) Against an association of persons who act as a corporation within this state without being legally incorporated. G. C. § 12303.

(6) Habeas Corpus is a writ directed to the person detaining another and commanding him to produce the body of the prisoner at a certain time and place, with the day and cause of his caption and detention, to do, submit to, and receive whatsoever the court or judge ordering the writ shall consider in that behalf. Bouvier's Law Dictionary, Baldwin's Revision.

A person unlawfully restrained of his liberty, or a per-

son entitled to the custody of another of which custody he is unlawfully deprived, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment, restraint, or deprivation. G. C. § 12161.

(7) Replevin is an action for the recovery of specific personal property. It may be brought where there is an unlawful detention of goods. Shur v. Statler, 2 D. Repr. 72.

The possession of specific personal property, may be recovered in an action as provided in this chapter. G. C. § 12051.

(8) A garnishment is an effectual attachment of the defendant's effects in the garnishee's hands. Bouvier's Law Dictionary, Baldwin's Revision.

"The person who has possession of property belonging to a defendant in attachment, or who owes him is called the garnishee." "When the plaintiff, his agent or attorney, makes oath in writing that he has good reason to believe and does believe, that any person, partnership or corporation in the affidavit named, has property of the defendant in his possession, describing it, if the officer can not get possession of such property, he shall leave with such garnishee, a copy of the order of attachment with a written notice that he appear before the justice at the return of the order of attachment, and answer as hereinafter set out. If the garnishee is a person, the copy of the order and notice shall be served on him personally or left at his usual place of residence. If a partnership is garnisheed by its company name, they shall be left at its usual place of doing business, or be served personally on a member of said partnership, and if a corporation, they shall be left with the president or other principal officer, or the secretary, cashier, or managing agents thereof; and if such corporation is a railroad company, they may be left with the regular ticket or freight agent thereof in the county." G. C. §§ 10265-10266.

(9) The object of attachment is to seize the debtor's goods and chattels and to subject debts due him to the satisfaction of a judgment to be thereafter rendered.

Except as hereinafter provided, the plaintiff shall have an order of attachment against property of the defendant in a civil action before a justice of the peace for the recovery of money, before or after its commencement, when there is filed in his office an affidavit of the plaintiff, his agent or attorney, showing the nature of the claim, that it is just, the amount the affiant believes that the plaintiff ought to recover, and that the property sought to be attached is not exempt from execution. If attachment of the personal earnings of defendant be sought, the affidavit also must state that he is not the head or support of a family nor in good faith the support of a widowed mother wholly dependent upon him for support, or that such earnings are not for services rendered within three months before the action was

begun, or that, if earned within that time they amount to more than one hundred and fifty dollars, and only the excess over that sum is sought to be attached; or that the claim sued on is for work, labor or necessaries, and, except in cases for such claims, the existence of one or more of the following particulars:

(1) That the defendant, or one of several defendants is a corporation, having no officer upon whom a summons can be served, or place of doing business in the county, or is a non-resident of the county. No proceedings in attachment shall be had to garnishee the salary or wages of an employee of a railroad company by reason of his non-residence, except before a justice or on account of his being a non-resident of the county in which his liability was incurred;

(2) Has absconded with intent to defraud his creditors;

(3) Has left the county of his residence to avoid the service of a summons;

(4) So conceals himself that a summons cannot be served on him;

(5) Is about to remove his property, or a part thereof, out of county, with the intent to defraud his creditors;

(6) Is about to convert his property, or a part thereof into money, for the purpose of placing it beyond the reach of his creditors;

(7) Has property or rights of action which he conceals;

(8) Has assigned, removed, or disposed of, or is about to assign, remove or dispose of his property, or a part thereof, with intent to defraud his creditors; or

(9) Fraudulently or criminally contracted the debt, or incurred the obligation, for which suit is about to be or has been brought. When the defendant is a corporation, having no officer in the county, upon whom a summons can be served, or a place of doing business in the county, or is a non-resident of the county, the attachment shall not be granted unless the claim is for a debt or demand arising on contract, judgment or decree. No attachment shall issue by virtue of this chapter against the personal earnings of any defendant for services rendered by such defendant within three months before the commencement of the action, or the issuing of the attachment, unless the defendant is not the head or support of a family, or unless the amount of such earnings exceed one hundred and fifty dollars, and then only as to the excess over that amount, or unless the claim is one for necessaries, and then for only twenty per cent of such personal earnings." G. C. §§ 10253, 11819.

(b) A plea in bar is a peremptory plea which goes to the merits of the plaintiff's demand, and shows some ground for barring or defeating the action upon its merits.

A plea in abatement is one that shows some ground for

abating either the original writ, or the declaration, and is often termed a dilatory plea. Pleas of this class are founded upon some legal defect in the writ or declaration; as, that the defendant is misnamed therein, or that the declaration does not pursue the writ, or that there is repugnance between them, or that there is a prior action pending between the same parties, for the same cause.

Furthermore, a dilatory plea makes a mere formal objection to the proceeding while a plea in bar makes a substantial and conclusive answer to the plaintiff's demand. Phillips on Code Pleading, §§ 58-61, p. 54, 57.

A plea in abatement may be made when there is a defect in the record, shown by facts extrinsic thereto. G. C. § 13622.

It is one of the ways of excepting to a criminal indictment. G. C. § 13622.

"After demurrer to an indictment is overruled, the accused may plead "not guilty" or "in bar". G. C. § 13628.

The accused may then offer a plea in bar to the indictment that he has before had judgment of acquittal, or has been convicted or pardoned for the same offense. To this plea, the prosecuting attorney may reply that there is no record of such acquittal or conviction, or that there has been no pardon. The issue thus made, shall be tried to a jury, and on such trial, the accused must produce the record of such conviction, or acquittal, or such pardon, and prove that he is the person charged in such record, or mentioned in such pardon. He may adduce such other evidence as is necessary to establish the identity of such offense. G. C. § 13630.

"A plea in bar or abatement shall not be received by the court unless it is in writing, signed by the accused, and sworn to before a competent officer." G. C. § 13631.

(2)

A brought suit upon a life insurance policy for recovery alleging in the petition that said policy was issued, insured was dead and that he was the beneficiary and entitled to the proceeds of the same; that said policy was now due and payable and that said defendant corporation refused to pay the same and then following up with a prayer for judgment. B filed a motion to compel the plaintiff to attach a copy of said policy to the petition. What was the ruling of the court? If said motion was overruled, what further could you do in the matter?

The ruling of the court should be to sustain the motion.

"G. C. § 11333 provides that when the action, counterclaim, or set-off is founded on an account or on a written instrument as evidence of indebtedness, a copy thereof

must be attached to and filed with the pleading. If not so attached and filed, the reason for the omission must be stated in the pleading."

"A written instrument, as evidence of indebtedness under G. C. § 11333, comprises any instrument which witnesses a promise, whether conditional or unconditional, on the part of the maker thereof, to pay a certain, fixed, liquidated sum of money; when sued on, a copy of such an instrument must be attached to the petition. An insurance policy is such an instrument and should be attached. If the application for insurance constitutes a part of the policy, it must also be attached, otherwise not." Lauer v. Life Assurance Society, 8 N. P. 117, 10 D. (N. P.) 397. Aff. Coldham v. Security Co., 8 C. C. 620, 4 C. D. 548.

In a suit to recover the amount due on a forfeited recognizance, the omission to attach to, or file with the petition, a copy of the record, is not ground of demurrer. It could be taken advantage of only by a motion to make more definite and certain. Colvin v. State, 12 O. S. 60.

The same principle would apply in the present case.

"It is error for the court wrongly to overrule a motion to make more definite and certain." Lancaster v. Miller, 58 O. S. 558, 51 N. E. 52. Black v. Goodman, 12 C. C. (N. S.) 287.

Hence an exception should be taken to the ruling of the court. No particular form of exception is required. The exception must be stated, with the facts, or so much of the evidence, as is necessary to explain it and no more, and the whole as briefly as possible. G. C. § 11562.

When the decision is not entered on the record, or the grounds of the objection do not sufficiently appear in the entry, or the exception is to the decision of a court on a motion to direct a non-suit, or to arrest the evidence from the jury, or for a new trial for misdirection to the jury, or because the verdict, or if a jury is waived, the finding of the court is against the law and the evidence, or on the admission or rejection of evidence, the party excepting must reduce his exceptions to writing, and file them in the cause, not later than 40 days after the overruling of the motion for a new trial, or the decision of the court, when the motion for a new trial is not filed. G. C. § 11564.

(3)

(a) A petition for damages growing out of personal injuries is presented to you by your client for examination and upon examination you are satisfied that it is subject to motion, as well as demurrer. What course will you pursue in the matter?

(b) What is a "negative pregnant?" Give an illustration.

(c) A brought suit for divorce against B asking for divorce, alimony and division of property-rights. B being dissatisfied with the judgment of the court in the matter, prosecutes error and appeal at the same time. Can B pursue both remedies at the same time? If not which is the proper procedure in this matter.

(a) A motion to strike out the undesirable parts, should first be presented, because by demurring, there is a waiver of grounds for motion.

"A demurrable objection may still be raised by demurrer, notwithstanding it has previously been raised by motion and dissallowed. Even where certain allegations are stricken out on motion, it has been held that the party may subsequently demur on the ground, that the pleading is defective for want of such allegations." 31 Cyc. 276.

"The defendant has the right, if he could do so by the use of the interlocutory motion provided by our code to compel the plaintiff to simplify his petition, and put it into such form as to make it fairly and properly, the object of demurrer, if insufficient in law, rather than to wait for a trial on the merits." W. H. Mullins Co. v. Jacob Friend Roofing Co., 5 N. P. (N. S.) 1, 17 D. 743.

"After the filing and overruling of a demurrer to a petition, a motion to make it more definite, is inadmissible." Caldwell v. Brown, 9 C. C. 691, 6 C. D. 694.

(b) A negative pregnant is the denial of some particular averment in such form as to impliedly admit a part of what is apparently controverted. Such evasive and ambiguous form of denial is called a negative pregnant because it is an express denial pregnant with an implied admission. Phillips on Code Pleading, § 361. See also Bliss on Pleading § 332; Aleshire v. Ry., 25 N. P. (N. S.) 76, 77.

A special denial in the words of the allegation denied is a mere negative pregnant and a motion to make more definite and certain will lie. Bouvier's Law Dictionary, Baldwin's Revision.

"A denial of all the averments of the petition in manner and form as therein stated, will be stricken off on motion, but a demurrer is not a proper method of raising its sufficiency. James Laurence v. Peter Cooley et al., 4 D. Repr. 261.

For example, if a complaint allege that on the first day of June, the plaintiff sold and delivered to the defendant, one horse, and the answer deny, "that on the first day of June, plaintiff sold and delivered to defendant, one horse, the denial is pregnant with the implied admission that on some other day, there was the sale and delivery alleged, and only the alleged date is traversed. Phillips on Code Pleading § 361.

(c) No. B cannot pursue both remedies at the same time. He cannot re-open the divorce, but can carry the de-

cree for alimony and division of property rights up on error. Before the amendment of Article IV, Section 6, of the Constitution of Ohio, on September 3, 1912, providing that all chancery cases are appealable, it was always held by the court of Ohio, that a decree of divorce could not be reviewed either by appeal, or by error. Pappalardo v. Pappalardo, 6 App. 291, 29 O. C. A. 449, 30 C. D. 285. Citing Bascom v. Bascom, 7 Ohio (pt. 2) 125; Laughery v. Laughery, 15 O. 404; Tappan v. Tappan, 6 O. S. 64; Parish v. Parish, 9 O. S. 534, and Mulligan v. Mulligan, 82 O. S. 426, 92 N. E. 1120.

Even though the court may feel that the language of article IV, Section 6, of the constitution of Ohio, as amended on September 3, 1912, might be so broad as to authorize review of divorce decrees, the court will not give such effect to this constitutional provision as amended, unless the language of the amendment clearly indicates such intention. Pappalardo v. Pappalardo, 6 App. 291.

No authority exists under the laws of Ohio for prosecuting error to a decree in a divorce proceeding, which either grants or refuses divorce. Smith v. Smith, 20 N. P. (N. S.) 94, 27 D. (N. P.) 508. (Petition in error dismissed by court of appeals).

While G. C. §§ 11987, 11996, 11999 and 12001 confer equity powers on the court of common pleas to be exercised in connection with suits for alimony, the exercise of such power is statutory and not inherent, and accordingly, such proceeding cannot be appealed. Marleau v. Marleau, 95 O. S. 162, 115 N. E. 1009. (Followed in Wells v. Wells, 98 O. S. 448, 121 N. E. 903).

No appeal from a judgment of divorce and alimony, now lies under the constitution of 1912. Condon v. Condon, 8 App. 189, 196, 30 O. C. A. 295, 301.

While the circuit court has no jurisdiction to dissolve the marital relation, yet in a case properly before it on appeal, it has full and complete jurisdiction to hear an determine all questions involving property rights growing out of marital relation. Ashbaugh v. McGillen, 16 C. C. (N. S.) 381, 31 C. D. 555.

(4)

(a) How and when may you raise the question of the jurisdiction of the court in a matter before it?

(b) What must a pleading contain under the General Code of Ohio?

(c) What must a petition contain to make it a proper pleading under the code?

(d) Name the grounds of demurrer under the General Code of Ohio.

(e) What are the names of the pleadings permissible under the General Code of Ohio?

(a) "When the want of jurisdiction of the person of the defendant appears on the face of the petition, demurrer is the proper remedy. Drea v. Carrington, 32 O. S. 602.

"Where the allegations of a petition upon its face make a case in which all the defendants are rightfully joined, the question of jurisdiction over persons must be raised by answer." Drea v. Carrington, 32 O. S. 595.

"The demurrer shall specify the grounds of objection to the petition, unless it does so it shall be regarded as objecting only that the court has no jurisdiction of the subject of the action, or that the petition does not state facts which show a cause of action." G. C. § 11310.

"When, on the face of a petition, no ground of demurrer appears, the objection may be taken by answer. If the objection is not made in either way, the defendant shall be deemed to have waived it, except only, that the court has no jurisdiction of the subject of the action and that the petition does not state facts which show a cause of action." G. C. § 11311.

Where it appears upon the face of the record, that the court has no jurisdiction of the subject matter, the failure to set up the want of jurisdiction by plea, is no waiver of the objection. Steamboat v. Long, 18 O. S. 521.

(b) "Every pleading must contain the name of the court and the county in which the action is brought, and the names of the parties followed by the name of the pleading." G. C. § 11304.

(c) "The first pleading shall be the petition by the plaintiff, which must contain:

1. A statement of facts constituting a cause of action in ordinary and concise language.

2. A demand for the relief to which the plaintiff claims to be entitled. If the recovery of money is demanded, the amount shall be stated, and if interest is claimed, the time for which interest is to be computed, shall be stated." G. C. § 11305.

(d) "The defendant may demur to the petition only when it appears on its face either:

1. That the court has not jurisdiction of the person of defendant;

2. That the court has no jurisdiction of the subject of the action;

3. That the plaintiff has no legal capacity to sue;

4. That there is another action pending between the same parties for the same cause;

5. That there is a misjoinder of parties, plaintiff or defendant;

6. That there is a defect of parties, plaintiff or defendant;

7. That several causes of action are improperly joined;

8. That separate causes of action against several defendants are improperly joined;
9. That the action was not brought within the time limited for the commencement of such actions; or
10. That the petition does not state facts, which show a cause of action. G. C. § 11309.

(e) The only pleadings in civil actions are:
1. Petition;
2. Demurrer to petition;
3. Answer, which if it demands affirmative relief, may be styled a cross-petition;
4. Demurrer to answer;
5. Reply.
6. Demurrer to reply. G. C. § 11309.

(5)

(a) Is habeas corpus a civil action or a special proceeding?
(b) Is replevin a civil action or a special proceeding?
(c) How is the character of a pleading to be determined?
(d) What is a caption?

(a) Habeas corpus is not a civil action, but a special proceeding and hence is not appealable. Ex parte Barney Miller, Habeas corpus, 19 C. C. 544, 10 C. D. 760.

Any ordinary proceeding in a court of justice, by which a party prosecuted another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense, involving the process and pleadings and ending in a judgment, is an action, while every proceeding other than an action, where a remedy is sought by an original application to a court for a judgment or order, is a special proceeding. To obtain a writ of habeas corpus a party does not prosecute another, but makes an original application to a court for the enforcement of a right. Hence, habeas corpus is a special proceeding. 10 C. D. 760 at p. 760.

(b) The action of replevin is a civil action.

Special provision is made for procedure in forcible entry and detainer (G. C. § 10447), and for replevin (G. C. § 10462), without special designation as to the nature or character of such cases. But of course they are civil cases or actions. Sonnanstine v. Bostwick, 18 N. P. (N. S.) 24 at p. 26.

(c) The character of a pleading may be determined by glancing at the caption, since every pleading must contain the name of the pleading. See G. C. § 11304.

(d) Caption—the heading of a legal instrument, in which it is shown when, where, and by what authority it was

taken, found or executed. Bouvier's Law Dictionary, Baldwin's Revision.

"Every pleading must contain the name of the court and the county in which the action is brought, and the names of the parties, followed by the name of the pleading." G. C. § 11304.

(6)

(a) What was the common law rule for construing pleadings?

(b) What is the present rule in Ohio?

(a) At common law, pleadings are to be strictly construed. Pleadings must not be doubtful or ambiguous in meaning, and when two different meanings present themselves, that construction shall be adopted which is most unfavorable to the party pleading. Shipman on Common Law Pleading, pp. 442, 518, 519.

(b) The present rule in Ohio is:

The allegations of a pleading shall be liberally construed with a view to substantial justice between the parties. G. C. § 11345. See 43 O. S. 78.

(7)

Which of the following matters involved in actions in Ohio must be pleaded, and which need not be pleaded:

(a) Federal statute;

(b) Statute of Indiana;

(c) Ordinance of Ohio municipal corporation;

(d) A provision of the Ohio constitution as amended September 3, 1912.

(a) Our state courts will take judicial notice of all federal laws. Therefore, it is not necessary that these laws should be pleaded, but only the facts that bring the case within their operation. Railroad Co. v. Welsh, 89 O. S. 81, 105 N. E. 189.

(b) A statute of Indiana must be pleaded.

"If it is claimed that the law of another state controls, then the law of that state must be pleaded." Erie Railroad Co. v. Welsh, 89 O. S. 81, 105 N. E. 189; Larwell v. Hanover Savings Fund Society, 40 O. S. 274.

(c) State courts cannot take judicial notice of a city ordinance. Toledo v. Libbie, 19 C. C. 704, 8 C. D. 589; Chittenden v. Columbus, 71 O. S. 477, 74 N. E. 1133.

But the city courts will take judicial notice of their own ordinances. Strauss v. Village of Conneaut, 3 C. C. (N. S.) 445, 13 C. D. 320; Keck v. Cincinnati, 3 N. P. 92, 8 D. 430.

Whatever a mayor's court or police court could judicially notice e. g., a city ordinance, the common pleas on

error thereto, will take judicial notice of. Akerman v. Lima, 7 N. P. 92; Keck v. Cincinnati, 8 D. 430.

(d) "Courts are, primarily bound to take judicial notice of the nature and constitution of the government of which they form a part". McKelvey on Evidence, 35.

Hence the courts would take judicial notice of such provision of the Ohio constitution. Hockett v. State Liquor Licensing B'd., 91 O. S. 176 at p. 186, 110 N. E. 485.

(8)

In his petition against a bank, the plaintiff averred that he had deposited a certain sum of money with the bank to be checked against by him, and that the bank failed to honor his checks and refused to repay the amount due to him. At the trial the evidence disclosed that no money had in fact been deposited, but that he had deposited a certain certificate of deposit for the amount named issued by a distant bank and that it was through the negligence of the defendant bank that the certificate was not collected and that the debt was lost.

(a) Did the petition contain the true theory of the case?

(b) Give reason for answer.

(a) No.

(b) In a suit against a bank to recover upon an allegation that at a date named, the plaintiff deposited with the bank, a sum of money named, which sum was deposited under an oral contract by which the bank was to safely keep said money and pay such checks as plaintiff should draw and repay any balance thereof, to plaintiff, evidence showing that no money was in fact, deposited, but that a certificate of deposit for the amount named issued by a distant bank to the plaintiff was at that time endorsed by the plaintiff to the defendant bank, and evidence seeking further to show that by the negligence of the bank in its effort to collect such certificate the debt was lost, and the bank was therefore liable, because of its negligence, is incompetent under the pleadings and its admission over the objection of the defendant prejudicial error. The reason is that there was material variance between the pleading and proof. Hilsinger v. Trickett, 86 O. S. 286, 99 N. E. 306.

(9)

(a) Why is it not proper to plead conclusions of law?

(b) In an action on a promissory note and a mortgage securing it, how would you draft the petition so as to avoid a jury trial on the note?

(a) "It is not proper to plead conclusions of law because in the first place, the substantive law is operative at

all times and upon all persons; it operates "proprio vigore", both out of court and in court, and needs not to be called into operation by a statement of its existence. In the next place, the law of procedure assumes that the law is known to those entrusted with its administration, and that they need not be advised by a statement of its existence." Phillips on Code Pleading § 33.

(b) In order to avoid a jury trial it is necessary to avoid the provisions of G. C. § 11379 which provides that issues of fact arising in actions for the recovery of money only, or specific real or personal property, shall be tried by a jury, unless a jury trial be waived, or a reference be ordered as hereinafter provided.

In order to avoid this section, in the prayer of the petition, the relief asked should be foreclosure of the mortgage, so that the property would be sold and proceeds applied to the debt, and no action on the note would then be necessary.

An action to foreclose a mortgage is not triable by a jury. Klone v. Bradstreet, 2 H. 74; 12 Dec. Repr. 336.

The case is not one for the jury if the mortgagor withdraws his prayer for personal judgment of money. Grapes v. Barbour, 58 O. S. 669, 49 N. E. 306.

There being then no prayer for a personal judgment, it was an action for the foreclosure of a mortgage only; and in such action neither party is entitled to demand a jury trial. idem at p. 675.

(10)

Your client has been sued in the court of common pleas of your county, in this state, and wishing to take advantage of the Statute of Limitations, what allegations would you set out in your answer to the petition? Why?

If the fact that the statute of limitations had run, was apparent on the face of the petition, such petition would be demurrable. G. C. § 11309-9. Zuellig v. Hermerlie, 60 O. S. 27, 53 N. E. 447.

If not apparent on the face of the petition, it might be set up in the answer as a reason why the plaintiff's cause of action was insufficient in law. It cannot be set up under a general denial, but is waived thereby. Towsley v. Moore, 30 O. S. 184.

An answer of Statute of Limitations (G. C. § 11218) is, as follows:

"The defendant says that the cause of action, alleged in the petition did not accrue within ..... years next before the commencement of this action, and is barred by the Statute of Limitations." See Form No. 3, Baldwin's Civil Practice Manual of Ohio.

(11)

Name the pleadings allowed under our code and define each one.

The only pleadings in civil actions are:

1. Petition;
2. Demurrer to petition;
3. Answer, which if it demands affirmative relief may be styled a cross-petition;
4. Demurrer to answer;
5. Reply;
6. Demurrer to reply. G. C. § 11303.

The petition is the first pleading by the plaintiff, stating his cause of action; which must contain:

1. A statement of facts constituting a cause of action in ordinary and concise language;
2. A demand for the relief to which the plaintiff claims to be entitled.

If the recovery of money is demanded, the amount shall be stated; and if interest is claimed; the time for which interest is to be computed is to be stated. G. C. § 11305.

Every pleading must contain the name of the court and the county in which the action is brought, and the names of the parties, followed by the name of the pleading. G. C. § 11304.

A demurrer is a pleading which excepts or objects to the pleading of the opposite party, as being insufficient in law and by which the party objecting rests or abides upon the point in question and submits it to the judgment of the court. Kinney's Law Dictionary p. 248.

For the causes of demurrer to the petition, see G. C. § 11309.

An answer is a written statement by the defendant of his case.

The answer shall contain:

1. A general or specific denial of each material allegation of the petition controverted by the defendant;
2. A statement in ordinary and concise language of new matter constituting a defense, counterclaim or set-off;
3. When a defendant seeks affirmative relief therein, a demand for such relief. G. C. § 11314.

The plaintiff may demur to a counterclaim, set-off, or defense consisting of new matter on the ground that on its face it is insufficient in law. G. C. § 11323.

For six causes of demurrer to answer, see G. C. § 11324.

When the answer contains new matter, the plaintiff may reply to it, denying generally or specifically each allegation controverted by him. He also may allege in ordinary

and concise language, new matter not inconsistent with the petition, constituting an answer to such new matter. G. C. § 11326.

The defendant may demur to the reply or to a separate denial or avoidance therein of a defense, counterclaim or set-off, on the ground that on its face it is insufficient in law. G. C. § 11327.

(12)

L files his petition in the common pleas court against your client M. You file a demurrer to the petition. By filing this demurrer what do you admit?

A demurrer admits the truth of the pleading demurred to, as far as is necessary to determine the adequacy of that pleading. Bush v. Critchfield, 5 O. 109.

A demurrer admits the truth of only such allegations as are well pleaded. Dawson v. Dawson, 25 O. S. 449; Railroad Co. v. Moore, 33 O. S. 384.

The truth of only such facts as are material and well pleaded is admitted by a demurrer. Faurot v. Neff, 32 O. S. 44; Peterson v. Roach, 32 O. S. 374.

It does not admit the truth of mere conclusions of law, nor of inconsistent allegations of fact, nor the correctness of mere conclusions drawn from the facts. Mitchell v. Treasurer, 25 O. S. 143; Hydraulic Co. v. Railway Co., 29 O. S. 341.

(13)

Name the several grounds of demurrer to petition.

The defendant may demur to the petition only when it appears on its face either:

1. That the court has no jurisdiction of the subject of the action;

2. That the court has no jurisdiction of the person of the defendant;

3. That the plaintiff has no legal capacity to sue;

4. That there is another action pending between the same parties for the same cause;

5. That there is a misjoinder of parties plaintiff or defendant;

7. That several causes of action are improperly joined;

8. That separate causes of action against several defendants are improperly joined;

9. That the action was not brought within the time limited for the commencement of such actions; or

10. That the petition does not state facts which show a cause of action. G. C. § 11309.

(14)

(a) What is a motion?
(b) Name the several statutory grounds for motion.

(a) A motion is an application for an order, addressed to a court or judge by a party to a suit or proceeding, or one interested therein. G. C. § 11370.

Some of the statutory grounds of motion in Ohio are:

(b)

1. Motion for arrest of Judgment. G. C. § 13748.
2. Motion for a new trial. G. C. § 13746 and G. C. §§ 11579, 10352.
3. Motion to quash indictment. G. C. § 13621.
4. Motion for attachment. G. C. § 11788.
5. Motion for appointment of receiver. G. C. § 11838.
6. Motion to vacate or modify injunction. G. C. § 11891.
7. Motion for stay of execution. G. C. § 12233.
8. Motion to strike out. G. C. § 11335.
9. Motion to strike from the files. G. C. § 11375.
10. Motion to compel production of books and papers. G. C. § 11551.
11. Motion for consolidation of actions. G. C. § 11369.
12. Motion to withdraw and make a separate action of counterclaim or set-off. G. C. § 11337.
13. Motion to compel inspection of books and papers. G. C. § 11552.
14. Motion to set aside judgment rendered in absence of defendant. G. C. § 10377.
15. Motion for leave to file petition in error. G. C. §§ 12250-12253.

(15)

(a) Give the definition of the word "Pleading" as used in the civil practice.
(b) What are the pleadings as prescribed by the Ohio Statutes?

(a) A pleading is a written statement in logical and legal form of the facts which constitute the plaintiff's cause of action or the defendant's ground of defense. Chitty on Pleading.

Pleadings are the mutual allegations or statements of the parties to a suit affirming on one side and denying on the other the matters in dispute. Stephen on Pleading (Tyler's Edition) p. 2.

Pleadings are for the purpose of notifying the parties of their respective claims. Kelley v. Armstrong, 102 O. S. 478, 132 N. E. 15.

(b) The pleadings as prescribed by the Ohio Statutes are as follows:

1. Petition;
2. Demurrer to petition;
3. Answer, which if it demands affirmative relief, may be styled a cross-petition;
4. Demurrer to answer;
5. Reply;
6. Demurrer to reply. G. C. § 11303.

(16)

(a) In equity practice, what is the meaning of the word "plea"?

(b) What is a plea in bar?

(c) In what branch of practice in Ohio is a plea in bar used?

(a) A plea is a special answer showing or relying upon one or more things as a cause why the suit should be, either dismissed, delayed, or barred. Bouvier's Law Dictionary, Baldwin's Revision.

A plea in Equity is a statement of facts not contained in the bill, to show cause why the suit should be dismissed, delayed, or barred. It differs from an answer, as it demands the judgment of the court in the first instance, whether the matters alleged in it do not debar the plaintiff from the right to an answer. Phillips on Code Pleading § 157.

(b) A plea in bar is one which goes to the merits of a plaintiff's demand, and shows some ground for barring or defeating the action upon its merits. A plea in bar may deny the truth of all or any of the material facts alleged in the declaration, or it may admit the facts so alleged, and state other facts to show that, because of such new facts, those alleged by the plaintiff, do not give him a right of action.

(c) It is used in criminal practice. The accused may offer a plea in bar to the indictment that he has before had judgment of acquittal, or has been convicted or pardoned for the same offense.

To this plea, the prosecuting attorney may reply that there is no record of such acquittal or conviction, or that there has been no pardon. G. C. § 13630.

(17)

In setting up a defense of fraud, what are the three things that necessarily must be alleged in your answer?

The following elements are necessary in setting up a defense of fraud (1) a false representation of a material fact made with knowledge of its falsity or with a wanton

disregard of whether it is false or true (2) Intention that the plaintiff shall act upon it to his damage (3) Action upon it by the plaintiff, and injury resulting thereby. Phillips on Code Pleading, § 244.

(18)

You represent a client who has an undivided 1/16 interest in a farm. One of your client's cousins, also a cotenant, has been in possession of the client's farm for two years, since the death of your client's grandfather, from whom your client inherited his interest. What are the necessary allegations to have all your client's rights determined in one action?

A person entitled to partition of an estate may file his petition therefore in the court of common pleas; setting forth the nature of his title, a pertinent description of the lands, tenements, or heriditaments of which partition is demanded, and naming each tenant in common, co-parcener or other person interested therein, as defendants. When the title to such estate came to such person by descent or devise upon the death of an inhabitant of this state, a partition thereof, shall not be ordered by the court within one year from the date of the death of such person, unless petition sets forth and it be proved that all debts and claims against the estate of such decedent have been paid, or secured to be paid, or that the personal property of the deceased is sufficient to pay them. G. C. § 12028.

One tenant in common or coparcener, may recover from another, his share of rents and profits received by such tenant in common or coparcener from the estate according to the justice and equity of the case. One parcener may maintain an action of waste against another, but no parcener shall have any privileges over another in any election, division, partition or matter to be made or done, concerning lands which have descended. G. C. § 12046.

Hence the elements to be set out would be those under G. C. § 12028 and also a prayer for an accounting under G. C. § 12046. G. C. §§ 11306-7 provides that a plaintiff may join claims to recover real property, with or without damages for withholding it, its rents and profits, and the partition thereof in the same petition. Causes of action for equitable partition and for an accounting of rents and profits may be joined. Perry v. Richardson, 27 O. S. 110.

(19)

(a) If you rely upon the statute of frauds as a defense, is it necessary to plead it?

(b) If you rely upon the statute of limitations as a defense, is it necessary to plead it?

(c) If you are relying upon an estoppel as a defense, is it necessary to plead the facts which show it?

(a) No. A general denial raises the defense of the statute of frauds. Birchell v. Neaster, 36 O. S. 331.

(b) YES, in order to obtain the benefit of the statute of limitations, a defendant must insist on it as a bar in his answer. If instead of so doing, he simply denies the allegation of the petition, he cannot upon the trial also insist upon the bar of the statute. Olive Towsley v. Joseph Moore, 30 O. S. 184; also Routson v. Jackson, 21 N. P. (N. S.) 521 at p. 530, 30 D. 145.

However, the statute need not be pleaded in actions for the recovery of real property. John Wintermute v. Henry H. Montgomery, 11 O. S. 442, 444.

(c) YES, all facts essential to the existence of estoppel must be averred with particularity and precision. Woodruff v. Montgomery et al, 11 C. C. (N. S.) 72, 20 C. D. 426.

(20)

Rockefeller operates a general store in Sunshine, Ohio. He sells Brown groceries and meats and also does some plumbing work on Brown's house at Brown's request. Rockefeller has only one account book and enters the grocery and meat items and the plumbing work and labor items all in one page of the book as debits against Brown. Brown does not pay. Can Rockefeller sue Brown on an open account in one cause of action, and recover for all the items? State reasons. Be brief!

Yes.

In an action, counterclaim, or set-off, founded upon an account, or * * * it shall be sufficient for a party to set forth a copy of the account * * *, with all credits * * * and to state that there is due to him, on such account * * *, from the adverse party, a specified sum which he claims with interest * * *. G.C.§ 11334.

Amounts due for work and labor and for goods sold and delivered are proper subjects of book account. Dallas v. Ferneau, 25 O.S. 635, 637.

(21)

(a) Is a cross-petitioner a party in an action in common pleas court?

(b) Is a garnishee a party in an action for necessaries in municipal court?

(c) Is a co-respondent a party in a divorce action?

(d) Can a minor child be made a party in a divorce action between the mother and father?

(a) Yes.

(b) No.

(c) No.
(d) No.

Parties are those who have a right to participate in the proceedings to assert a demand or make defense, to introduce testimony, and to appeal from the decision. Phillips on Code Pleadings, § 449.

The garnishee is not in Ohio, as in many of the states, a party to the attachment action. He has no day in court. Barbour v. Boice, 5 N.P. 273, 8 D. 548; citing Secor v. Witler, 39 O.S. 218.

Except in England, unless authorized by statute the person charged as particeps criminis with defendant in an act of adultery upon which the suit is based cannot intervene to protect his character. 19 C.J. 99, § 237-2.

The jurisdiction of the court of common pleas in divorce cases is defined by statute, and is limited to the question at issue as between the plaintiff and defendant. Children are not proper parties, nor can they be made parties in such an action. Schlenker v. Ferdon, 21 App. 222, 225.

(22)

If a party to a tort action should die between the time the issues are joined and trial day, what must be done to have the pleadings in proper form before trial?

If before judgment, one of the parties to an action dies, * * * but the right of action survives in favor of * * * his representatives or successor, the action may be revived, and proceed in the name of such representatives or successors. G.C.§ 11401.

A revivor may be effected by the court, or a judge in vacation, allowing a motion of the representative or successor in interest to become a party to the action, or by supplemental pleading alleging the death of the party, and naming his representative or successor in interest upon whom service may be made as in the commencement of an action. The limitations contained in subsequent sections of this chapter do not apply to this section. G.C.§ 11402.

(23)

M leased property to S for ten years, the lease containing a covenant by the lessee to insure the premises and keep them insured in an amount fixed by the lease. The lease provided that if S failed to do so, the lessor M might insure and sue S for the premiums. M five years later by endorsement on the lease assigned all his right title and interest in the lease to X. S failed to insure, X did so, and now sues for the amount of the premium paid. S objects that M was the only person that could sue upon the covenant.

How should the court decide, and why?

The court should rule for X.

An action must be prosecuted by the real party in interest, except as provided in the next three succeeding sections * * *. G.C.§ 11241.

An assignee of a reversion, having also assigned to him, by the terms of his contract of conveyance, the benefit of the covenants in a lease, may bring an action in his own name for a breach of such covenants, as the party beneficially interested, under the code of civil procedure (now G.C.§ 11241). A covenant to insure, when the money realized, in case of loss, is to be expended in rebuilding or repair, is such a covenant as may run with the land. Masury v. Southworth, 9 O.S. 341; App. in Kuebler v. Cleveland Short Line Co., 20 D. 525, 534.

(24)

What is the purpose of a supplemental petition; and when can it be filed?

To bring before the court some event which has happened subsequently to the commencement of the suit. Coe v. Col., Piq. & Ind. Ry., 10 O.S. 365, 372; App. in Scofield v. Excelsior Oil Co., 20 C.C.(N.S.) 513, 516, aff. 74 O.S. 513.

On such terms as to costs as the court, or a judge thereof, prescribes, either party may be allowed to file a supplemental petition, answer or reply, alleging facts material to the case which occurred since the filing of the former petition, answer, or reply. Reasonable notice of the application therefor must be given, when the court or judge so requires. G.C.§ 11368.

It is within the discretion of the court to allow such a pleading to be filed during the progress of a cause. Cincinnati v. Cameron, 33 O.S. 336.

However, R.S.§ 5119 (now G.C.§11368) does not authorize the plaintiff to file a supplemental petition after final judgment has been rendered, for the purpose of vacating, reversing or modifying such judgment. Bullock v. Kilgour, 39 O.S. 543, 546.

(25)

(a) How do you plead a judgment?

(b) May interrogatories be attached to a demurrer? Why?

(a) In pleading a judgment, or other determination of a court, or of an officer of special jurisdiction, it is sufficient to state that such judgment or determination was duly given or made. If such allegation be controverted, the party pleading must establish, on the trial, the facts conferring jurisdiction. G.C.§ 11338.

(b) No.

A party may annex to his pleading, other than a demurrer, interrogatories, pertinent to the issue made in the

pleadings, which interrogatories, if not demurred to, shall be plainly and fully answered under oath, by the party to whom they are propounded, or if such party is a corporation, by its president, secretary, or other officer thereof, as the party propounding requires. G.C.§ 11348.

(26)

Can a cause of action for personal injury be joined in the same petition with a cause of action to foreclose a mortgage?

No.

G.C.§ 11306 provides:

The plaintiff may unite several causes of action in the same petition, whether they are legal or equitable, or both, when they are included in any of the following classes:

* * *

4. Injuries to person and property, or to either;

* * *

8. Claims to foreclose a mortgage given to secure the payment of money or to enforce a specific lien for money, and to recover a personal judgment for the debt secured by such mortgage or lien; * * *.

It can be readily seen that this section does not permit such joinder.

(27)

(a) What is a prayer?

(b) Is the nature of the action determined by the prayer?

(c) Need an answer contain a prayer?

(a) A prayer for relief is the legal consequences which the plaintiff conceives the law attaches to his statement of facts. Tiffin Glass Co. v. Stoehr, 54 O.S. 157, 163.

A demand for relief to which the plaintiff supposes himself entitled. Phillips Code Pleading, §218.

(b) No.

As the prayer is no part of the cause of action or ground of defense, the nature of the action is determined by the facts stated and not by the prayer. Bates' New Pleading, Practice, Parties & Forms, vol. 1, p. 305, § 3; citing, Smith v. Smith, 67 Kan. 841; State v. Horton, 161 Mo. 664.

(c) No.

An answer not seeking affirmative relief need not contain a prayer. Thus, an answer of another action pending need not ask that the suit be abated. Bates' New Pleading, Practice, Parties & Forms, vol. 1, p. 306, § 2.

(28)

An answer contained the following: "The defendant denies each and every allegation contained in said petition

not herein expressly admitted, and says further that the collision of said automobiles was caused wholly without any fault on the part of the defendant, and that whatever injuries the plaintiff sustained were caused by the negligence of T. G. D. in operating the automobile in which plaintiff was riding, or by the acts of plaintiff contributed thereto."

(a) Is such portion of the pleading in good and proper form?

(b) Does such pleading constitute a confession and avoidance?

(c) Does the averment that the injury was caused, not by the defendant, but by a third party, constitute an affirmative defense?

(a) Yes.
(b) No.
(c) No.

In the answer there was no admission of negligence on the part of defendant, no confession and avoidance. The averment that the injury was caused, not by the defendant, but by a third party, does not constitute an affirmative defense. Montanari v. Haworth, 108 O.S. 8, 11.

(29)

(a) How should all pleadings be construed, and why?

(b) In construing a pleading what portions thereof should be considered?

(c) The plaintiff files his petition and seeks to recover damages for personal injuries, the pleading is not verified; when and how would you raise the question?

(d) After you have raised the question concerning lack of verification the party asks for leave to amend. Should such leave be granted? If granted, is it necessary that new summons issue and new service be made on the defendant?

(a) The allegations of a pleading shall be liberally construed, with a view to substantial justice between the parties. G.C.§ 11345.

It is a well known principle of law, supported by statutory authority, that pleadings must be liberally construed, with a view to accomplish substantial justice. Doebel v. Curnayn, 17 App. 346, 348.

(b) All parts.

All parts of a petition must be construed together. Trimble v. Doty, 16 O.S. 119, 130.

(c) The defendant should raise the question by a motion to strike from the files when the petition is filed. It cannot be cured by amendment. Boyles v. Hoyt, 2 D. Rep. 376, 2 W.L.M. 548; Stickney v. Wolf, 2 D. Repr. 403, 2 W.L.M. 602; Kerns v. Roberts, 2 D. Repr. 537, 3 W.L.M. 604.

(d) Yes.

Where no verification has been attached to a petition, or one which is a nullity, the proceeding may be made conformable to the code in that respect, by attaching a verification. Meade v. Thorne, 2 D. Repr. 289, 2 W.L.M. 312.

Before or after judgment, in furtherance of justice and on such terms as it deems proper, the court may amend any pleading, process, or proceeding, by adding or striking out the name of any party, or by correcting a mistake in the name of a party or a mistake in any other respect, or by inserting other allegations material to the case, or, when the amendment does not substantially change the claim or defense, by conforming the pleading or proceeding to the facts proved. When an action or proceeding fails to conform to the provisions of this title, the court may permit either to be made conformable thereto, by amendment. G.C.§ 11363.

A new summons and service is not required. Meade v. Thorne, 2 D. Repr. 289, 2 W.L.M. 312.

But see to the contrary, Kerns v. Roberts, 2 D. Repr. 537, 3 W.L.M. 604; White v. Freese, 2 C.S.C.R. 30.

(30)

(a) Will the courts take judicial notice of state statutes or is it necessary to plead them?

(b) Will the courts take judicial notice of municipal ordinances or is it necessary to plead them?

(c) Will the courts take judicial notice of the law of a foreign state, or is it necessary to plead the same?

(d) Where reliance is placed on a legal duty to the plaintiff as a ground for recovery, what facts need be averred?

(a) Yes.

It is, of course, not necessary to plead a statute, and the petition must be held to state a good cause of action if the allegations of the petition can be fairly construed to show any dereliction of the duty defined by the statute proximately resulting in injury and damage to the plaintiff. It is only necessary to introduce evidence to substantiate the operative facts, and if it is an equity proceeding the court takes judicial notice of the law and applies the law to the facts as established by the evidence. Steel Co. v. Sheller, 108 O.S. 106, 110; Toledo, Fostoria & Findlay Ry. v. Toledo & Ohio Central Ry., 21 App. 231; State v. Mulford, 12 D. 655, 657.

(b) No.

It is well known, that the courts of the state take judicial notice of the laws of the state legislature; and it is equally well known that the state courts do not take judicial notice of municipal ordinances. The law as it exists by ordinance, when pertinent to the issue in the law suit must be proven. State v. O'Mara, 105 O.S. 94, 99; Tele. Co. v. Meyers, 99

O.S. 338; Schulte v. Johnson, 106 O.S. 359; Gilhooley v. Railway, Power & Light Co., 20 N.P.(N.S.) 545, 29 D. 29.

However, city courts may take judicial notice of their own ordinances. Keck v. Cincinnati, 3 N.P. 253, 4 D. 324; Akerman v. Lima, 7 N.P. 92, 8 D. 430; Strauss v. Conneaut, 3 C.C.(N.S.) 445, 13 C.D. 320.

(c) No.

If the claim is that the law of another state controls, then the law of that state must be pleaded. Erie Ry. v. Welsh, 89 O.S. 81, 85; Yeazel v. L. & N. Ry., 13 App. 499, 504.

Printed copies of written laws enacted by another state, a territory of the United States, or foreign government, proved or purporting to have been published by its authority, or proved to be commonly admitted as evidence of the existing law in the courts or tribunals thereof, respectively, on all occasions, by the courts and officers of this state, shall be admitted as presumptive evidence of such law. G.C.§ 11498.

(d) The facts creating such duty should be alleged in his petition. C., C., C. & St. L. Ry. v. Potter, 113 O.S. 591, 150 N.E. 44; Armour & Co. v. Ott, 117 O.S. 252, 256, 158 N.E. 189.

(31)

(a) What must every pleading contain?
(b) What is a cross-petition?

(a) Every pleading must contain the name of the court and the county in whch the action is brought, and the names of the parties, followed by the name of the pleading. G.C.§ 11304.

(b) An answer containing a prayer for judgment and the necessary averments to show the party's right to such relief, under the proceedings instituted against him. Klonne v. Bradstreet, 7 O.S. 323.

An answer if it demands affirmative relief may be styled a cross-petition. G.C.§ 11303-3.

(32)

Brown sued Jones and in his petition set up two causes of action. The first cause of action was upon a promissory note for $500 made by Jones and payable to the order of Brown. Second cause of action alleges that Brown received bodily injury by reason of an assault and battery committed by Jones and that he suffered damages $1,000. He prays for judgment for $1,500. What, if any, preliminary attack may Jones make upon this petition? Why?

Jones should demur specially.

The defendant may demur to the petition only when it appears on its face either:

* * *

7. That several causes of action are improperly joined; * * * G.C.§ 11309.

The demurrer shall specify the grounds of objection to the petition. Unless it does so, it shall be regarded as objecting only that the court has no jurisdiction of the subject of the action, or that the petition does not state facts which show a cause of action. G.C.§ 11310.

The actions in the above case were improperly joined. G.C.§ 11306 provides:

The plaintiff may unite several causes of action in the same petition, whether they are legal or equitable, or both, when they are included in any of the following classes:

* * *

3. Contracts express or implied;

4. Injuries to person and property or either;

* * *.

It can be seen that the two causes of action above are not included in the same class.

(33)

A Delaware corporation doing business in that state only is legally liable to X for tort. X having become a resident of Columbus, Ohio, after the tort was committed, has filed suit thereon against the corporation in the common pleas court of Franklin county, Ohio, and has caused summons in the action to be personally served upon Y as the president of defendant corporation, while Y was in Columbus attending an industrial convention. The sheriff has made a proper return of the summons showing service as aforesaid. Assuming that petition does not state facts sufficient to constitute a cause of action, what should be done on behalf of the corporation?

A motion should be filed to quash and set aside the service of summons.

When the defendant is a foreign corporation, having a managing agent in this state, the service may be upon such agent. G.C.§ 11290.

Service of summons upon a foreign corporation whose place of business is outside of the state, having no agents in Ohio and transacting its business in the different states by mail, is controlled exclusively by G.C.§ 11290.

Service upon such foreign corporation to be good must be made upon the managing agent, and when the sheriff's return shows service only upon the president, it not appearing what the duties of the president are, nor that he is managing agent, it is incumbent upon the plaintiff to prove that such president is the managing agent.

Where the president of such foreign corporation is in Ohio for the sole purpose of attending a national convention, his presence is merely temporary and incidental, and he is not doing business within the meaning of the law to afford

a sufficient basis for service of summons. Hurd v. Ransom & Co., 13 App. 135, 31 O.C.A. 477.

(34)

In an action by A against B and C for damages for personal injuries, the petition shows that A is a minor, that A verified the petition, that while standing in a safety zone in a city street ready to board an approaching street car, A received the injuries complained of by being struck by a truck owned by B, being negligently operated by C, who was then acting within the scope of his employment. As C's attorney, what defects do you see in the petition, and how may you attack them?

1. The plaintff, A, did not have legal capacity to sue in his own name;

2. The plaintiff, A, had no power to verify;

3. There can be no joint action against master and servant, when negligent act arises solely from the relationship between them under the doctrine of respondant superior.

The first and third defects should be attacked by special demur, while the second defect should be attacked by a motion to strike the pleading from the files.

The defendant may demur to the petition only when it appears on its face either:

* * *

3. That the plaintiff has not legal capacity to sue;

* * *

5. That there is a misjoinder of parties plaintiff or defendant.

* * *. G.C.§ 11309.

The demurrer shall specify the grounds of objection to the petition. Unless it does so, it shall be regarded as objecting only that the court has no jurisdiction of the subject of the action, or that the petition does not state facts which show a cause of action. G.C.§ 11310; see also, Stang v. Newburger, 6 N.P. 60, 8 D. 80; Haskins v. Alcott, 13 O.S. 210, 217.

The action of an insane person must be brought by his guardian; and of an infant by his guardian or next friend * * *. G.C.§ 11247.

The practice of permitting an infant to sue by his next friend is immemorial and is well approved at common law, and by decisions under the constitution of 1802 and that of 1851. Accordingly G.C.§§ 11247, 11248, which provide specifically that the action of an infant must be brought by his guardian or next friend are valid and constitutional. Tuttle v. Furi, 22 C.C.(N.S.) 388, 33 C.D. 626; citing, Massie v. Long, 2 O. 287; Hanley v. Levin, 5 O. 228; Pennsylvania Co. v. Gallagher, 40 O.S. 637.

The affidavit verifying a pleading can be made by the agent or attorney only:

* * *

2. When the plaintiff is an infant, or of unsound mind, or imprisoned;

* * *. G.C.§ 11358.

If an action is brought by the next friend on behalf of an infant, the verification of the petition may properly be made by the next friend. Tuttle v. Furi, 22 C.C.(N.S.) 388, 33 C.D. 626.

A motion to strike from the files pleadings verified by an infant himself instead of by his agent or attorney as prescribed in G.C.§ 11358, will be sustained. Menke v. Motor Car Co., 21 N.P.(N.S.) 534, 30 D. 159; see also, G.C.§ 11375.

An action cannot be maintained jointly against master and servant for the wrongful and negligent act of the latter if in the particular case the master's liability for such wrongful and negligent act arises solely from the relationship between them under the doctrine of respondant superior. French v. Central Const. Co., 76 O.S. 509; app. Clark v. Fry, 8 O.S. 358; see also, Henshaw v. Noble, 7 O.S. 226.

(35)

To a petition which is demurrable only on the ground that it appears upon the face thereof that the action was not brought within the time limited for the commencement of such an action, the defendant filed the following demurrer with proper caption and signature:

"The defendant respectfully demurs to the petition heretofore filed herein."

Should the demurrer be sustained or overruled?

The demurrer should be overruled.

The demurrer should have been special.

The defendant may demur to the petition only when it appears on its face either:

* * *

9. That the action was not brought within the time limited for the commencement of such actions;

* * *. G.C.§ 11309.

The demurrer shall specify the grounds of objection to the petition. Unless it does so it shall be regarded as objecting only that the court has no jurisdiction of the subject of the action, or that the petition does not state facts which show a cause of action. G.C.§ 11310.

Real Property

(Numbers in parenthesis refer to answers following.)

I. ESTATES.

A. Fee Simple. (38)

Deeds, 75 to 77; Wills, 350 to 353.

G.C.§§ 8510-1, 10580; 37 O.S. 141; 21 App. 236.

B. For Life; Waste. (17, 26)

Deeds, 81; Life Estates, 1 et seq; Waste, 1 et seq; Wills, 356 to 365.

G.C.§§ 5688, 12042; 2 O.S. 181; 18 C.C.(N.S.) 559; 16 O.F.D. 31.

C. Homestead. (3c)

Homestead, 1 et seq.

G.C.§§ 11730 to 11740; 61 O.S. 272; 64 O.S. 491; 27 App. 86.

D. Leases, Landlord and Tenant. (2b, 10, 21, 25, 30, 31, 39)

See Personal Property, II.

E. By Curtsey, by Dower. (3d, 28)

Dower, 1 et seq.

Deibel's Ohio Probate Manual, §§ 477, 478; Curtsey abolished, G.C.§ 8614; G.C.§§ 8606 to 8616; 12004 to 12025; 20 App. 419; 24 App. 342.

F. Tenancy in Common; Partition. (8, 9, 18, 26a)

Partition, 1 et seq; Tenancy in Common, 1 et seq.

G.C.§§ 12026 to 12050; 15 O.S. 337; 46 O.S. 66; 104 O.S. 537; 105 O.S. 346; 110 O.S. 18; 20 App. 101; 30 App. 298.

G. Rule in Shelly's Case.

Deeds, 80; Wills, 380, 381.

Abolished: Deeds, G.C.§ 8510-1; Wills, G.C.§ 10578.

H. Estates Tail; Perpetuities. (17)

Estates Tail, 1 et seq; Wills, 366 to 377.

Deibel's Ohio Probate Manual, §§ 489 to 491; G.C.§§ 8622, 11925 to 11931; 11 O.S. 173; 55 O.S. 478; 90 O.S. 467; 110 O.S. 644; 24 N.P.(N.S.) 129.

II. TITLE BY DEVISE.

See Wills.

III. DESCENT AND DISTRIBUTION. (1, 4b, 6, 8, 10, 14, 16, 17, 18, 37)

Descent and Distribution, 1 et seq.

G.C.§§ 8573 to 8605; 105 O.S. 401; 106 O.S. 327; 110 O.S. 153; 112 O.S. 269; 113 O.S. 526; 115 O.S. 575; 115 O.S. 639; 116 O.S. 113; 119 O.S. 9.

[*References are to Bates' Compact Ohio Digest.*]

IV. FRAUDULENT CONVEYANCES.

Fraudulent Conveyances, 1 et seq.

G.C.§§ 8618, 11104, 11105; 40 O.S. 107; 89 O.S. 172; 18 App. 211; 19 App. 207; 23 App. 481; 26 N.P.(N.S.) 552.

V. STATUTE OF FRAUDS. (22)

Frauds, Statute of, 22 to 37.

G.C.§§ 8617 to 8621; 3 O. 294; 6 O. 484; 27 N.P.(N.S.) 145.

VI. MORTGAGES. (4a, 19, 27, 28)

Mortgages, 1 et seq.

G.C.§§ 8510 to 8516, 8542 to 8559; 11221, 11306(8), 11383, 11588 to 11590; 43 O.S. 427; 67 O.S. 316; 18 App. 129; 26 App. 130.

VII. DEEDS. (11, 12, 15, 19, 23)

Deeds, 1 et seq.

G.C.§§ 8510 to 8516-1, 8523 to 8532, 8543; 17 O.S. 139; 34 O.S. 610; 35 O.S. 125; 35 O.S. 406; 42 O.S. 47; 55 O.S. 274; 57 O.S. 148; 87 O.S. 173; 23 App. 194.

VIII. REGISTRATION OF LAND TITLES, TORRENS SYSTEM.

Records, 5.

Deibel's Ohio Probate Manual, §§ 447, 448; G.C.§§ 8572-1 to 8572-118; 1 Cin. Law Review 472.

IX. SALE OF REAL PROPERTY, VENDOR'S LIEN. (13, 20, 22, 23, 34, 36)

Vendor and Purchaser, 1 et seq.

G.C.§ 8543-1; 1 O. 318; 5 O. 36; 17 O.S. 11; 24 O.S. 402; 43 O.S. 198; 55 O.S. 274; 56 O.S. 273; 27 App. 430.

X. ESTOPPEL BY DEED.

Estoppel, 7 to 20.

11 O. 316; 11 O. 475; 32 O.S. 502; 41 O.S. 437; 67 O.S. 223.

XI. MECHANIC'S LIENS.

Mechanic's Liens, 1 et seq.

O. Const., Art. 2, § 33; G.C.§§ 8309 to 8352; 109 O.S. 358; 115 O.S. 555; 17 App. 429.

XII. EASEMENTS, PROFITS, PRESCRIPTION.

A. Creation, Kinds and Termination.

Easements, 1 to 24.

19 O.S. 135; 23 O.S. 187; 23 O.S. 614; 92 O.S. 96; 111 O.S. 341; 7 App. 251; 19 App. 489; 28 App. 392; 23 C.C.(N.S.) 465.

B. Extent of Right, Use and Obstruction. (33)

Easements, 27 to 32.

G.C.§§ 5908, 8913; 21 O.S. 235; 56 O.S. 463; 56 O.S. 479; 97 O.S. 83; 99 O.S. 133; 101 O.S. 19; 101 O.S. 331; 104 O.S. 79.

XIII. LICENSES.

Licenses, 31 to 39.

33 O.S. 138; 72 O.S. 272; 79 O.S. 121; 79 O.S. 279.

XIV. ADVERSE POSSESSION. (24)

Adverse Possession, 1 et seq.

G.C.§§ 11219, 11220; 17 O.S. 130; 19 O.S. 135; 22 O.S. 32; 29 O.S. 379; 33 O.S. 395; 56 O.S. 162; 74 O.S. 295; 18 App. 506.

XV. EMINENT DOMAIN.

Eminent Domain, 1 et seq.

Deibel's Ohio Probate Manual, § 1145; G.C.§§ 3677 to 3697, 3995 to 3998, 8572-67, 11038 to 11091.

XVI. COVENANTS OF TITLE, RUNNING WITH THE LAND, AND OF WARRANTY. (15)

Covenants, 1 et seq; Deeds, 91 to 94.

3 O. 211; 9 O.S. 340; 9 O.S. 595; 11 O.S. 79; 21 O.S. 247; 29 O.S. 642; 114 O.S. 685; 4 App. 425; 20 App. 362; 23 App. 352; 8 N.P. 681; 23 N.P.(N.S.) 189.

XVII. LATERAL AND SUBJACENT SUPPORT.

Adjoining Land Owners, 1 et seq; Municipal Corporations, 383 to 387.

G.C.§§ 3782, 3783; 27 O.S. 306; 38 O.S. 141; 20 App. 180; 21 C.C.(N.S.) 598.

XVIII. WATERS, WATER COURSES, RIPARIAN OWNERS.

A. Natural Water Courses, Pollution, Accretion, Avulsion.

Waters and Water Courses, 1 to 42.

G.C.§§ 6727 to 6776; 11 O. 311; 16 O. 540; 36 O.S. 423; 58 O.S. 41; 79 O.S. 263; 96 O.S. 139; 4 App. 236; 20 App. 452; 21 App. 491; 22 App. 82; 6 N.P. 392.

B. Subterrean and Percolating Waters. (29)

Waters and Water Courses, 45 to 49.

12 O.S. 294; 48 O.S. 41; 49 O.S. 82; 57 O.S. 317; 23 C.C.(N.S.) 342.

C. Surface Waters.

Waters and Water Courses, 52 to 61.

16 O.S. 334; 22 O.S. 247; 44 O.S. 279; 54 O.S. 247; 88 O.S. 151; 97 O.S. 210; 19 App. 89; 11 C.C.(N.S.) 359; 23 C.C.(N.S.) 168; 1 D. 223.

D. Artificial Ponds, Reservoirs, Channels.

Waters and Water Courses, 68 to 70.

G.C.§§ 6763 to 6776; 5 O. 323; 22 C.C.(N.S.) 574; 14 C.D. 472.

E. Public Water Supply.

Waters and Water Courses, 73 to 75.

66 O.S. 19; 2 B. 135; 8 C.C. 124.

XIX. BOUNDARIES. (3b, 5b)

Boundaries, 1 et seq .

G.C.§§ 2807, 2808, 4543, 8533; 2 O.S. 593; 7 O.S. 99; 25 O.S. 115; 46 O.S. 373.

XX. HIGHWAYS AND STREETS; ABUTTING PROPERTY OWNERS. (32, 35)

Municipal Corporations, 374 to 402; Roads, Highways and Turnpikes, 90 to 101; Street Railroads, 52 to 70.

21 O.S. 248; 38 O.S. 41; 66 O.S. 166; 66 O.S. 215; 80 O.S. 331.

XXI. DEDICATION OF PROPERTY.

Dedication, 1 et seq.

G.C.§§ 3580, 3723, 4353, 6886, 11220; 1 O.S. 478; 19 O.S. 514; 19 App. 225; 24 App. 73; 25 App. 301; 26 App. 590.

XXII. FIXTURES.

See Personal Property, XII.

XXIII. EXECUTORS AND ADMINISTRATORS. (7)

See Wills, XVIII.

Definitions

REAL PROPERTY.—Land, and generally whatever is erected or growing upon or affixed to land. Bouvier's Law Dictionary, Baldwin's Revision.

FEE-SIMPLE.—An estate of inheritance. It is the largest possible estate which a man can have, being an absolute estate. It is where lands are given to a man and to his heirs absolutely, without any end or limitation put to the estate. Bouvier's Law Dictionary, Baldwin's Revision.

FEE-TAIL.—An inheritable estate which can descend to certain classes of heirs only. It is necessary that they should be heirs "of the body" of the ancestor, and these are proper words of limitation. Bouvier's Law Dictionary, Baldwin's Revision.

STATUTE AGAINST PERPETUITIES.—No estate in fee simple, fee tail, or any lesser estate, in lands or tenements, lying within this state, shall be given or granted, by deed or will, to any person or persons but such as are in being, or to the immediate issue or descendants of such as are in being at the time of making such deed or will; and all estates given in tail shall be and remain an absolute estate in fee simple to the issue of the first donee in tail. Throckmorton's General Code of Ohio, § 8622.

VENDOR'S LIEN.—An equitable lien allowed the vendor of land sold for the unpaid purchase-money. Bouvier's Law Dictionary, Baldwin's Revision.

As between the vendor and vendee of land the vendor shall have a lien for so much of the purchase money as remains unpaid. But such lien shall not be effective as against a purchaser, mortgagee, judgment, creditor, or other encumbrancer, unless there be a recital or a reservation of the lien in the deed, or in some instrument of record executed with the same formalities as are required for the execution of deeds and mortgages of land. By taking back a mortgage, for any unpaid purchase money, on the land conveyed or any part thereof, the vendor shall be deemed to have waived his vendor's lien, and the filing for record of such a mortgage with the recorder of the county wherein said land is located shall be constructive notice of the waiver of the vendor's lien. Throckmorton's General Code of Ohio, § 8543-1. (Enacted 1929.)

EASEMENT.—A right in the owner of one parcel of land, by reason of such ownership, to use the land of another for a special purpose not inconsistent with a general property in the owner. Bouvier's Law Dictionary, Baldwin's Revision.

LICENSE.—A permission to do some act or series of acts on the land of the licensor, without having any permanent interest in it; it is founded on personal confidence, and not assignable. Bouvier's Law Dictionary, Baldwin's Revision.

ACCRETION.—Accretion is increase of real estate by gradual deposit by water of solid material, so as to create dry land of that previously submerged. Baumhart v. McClure, 21 App. 491.

RELICTION.—Reliction is increase of land by retreat or recession of water. Baumhart v. McClure, 21 App. 491.

AVULSION.—The removal of a considerable quantity of soil from the land of one man, and its deposit upon or annexation to the land of another, suddenly and by the perceptible action of water. Bouvier's Law Dictionary, Baldwin's Revision.

DOWER.—A widow or widower who has not relinquished or been barred of it, shall be endowed of an estate for life in one-third of all the real property of which the deceased consort was seized as an estate of inheritance at any time during the marriage, in one-third of all the real property of which the deceased consort, a decease, held the fee simple in reversion or remainder, and in one-third of all the title or interest that the deceased consort had, at decease, in any real property held by article, bond, or other evidence of claim. Throckmorton's General Code of Ohio, § 8606.

WASTE.—Spoil or destruction, done or permitted, to lands, houses, or other corporeal hereditaments, by the tenant thereof to the prejudice of the heir or of him in reversion or remainder. Bouvier's Law Dictionary, Baldwin's Revision.

EMBELEMENTS.—The right of a tenant to take and carry away, after his tenancy has ended, such annual products of the land as have resulted from his own care and labor. The term is also applied to the crops themselves. Bouvier's Law Dictionary, Baldwin's Revision.

OHIO STATE BAR EXAMINATIONS

QUESTIONS WITH ANSWERS

[*Arranged Chronologically.*]

(1)

When a person dies intestate, having title or right in Ohio the title to which came to the intestate decedent by deed of gift from an ancestor.

When a person dies intestate, having title or right to any real estate or inheritance in this state, which title

came to such intestate by descent, devise or deed of gift from an ancestor, such estate shall descend and pass in parcenary to his or her kindred in the following course:

1. To the children of such intestate, or their legal representatives.

2. If there are no children or their legal representatives living, the estate shall pass to and vest in the husband or wife relict of such intestate, during his or her natural life.

3. If such intestate leave no husband or wife, relict of himself or herself, or at the death of such relict, the estate shall pass to and vest in the parents of such intestate, and the survivor of such parents during the life of such parents and such survivor of them. If there are no such parents, or upon the death of both such parents, the estate shall pass to and vest in the brothers and sisters of the intestate who are of the blood of the ancestor from whom the estate came, or their legal representatives, whether such brothers and sisters be of the whole or half-blood of the intestate.

4. If there are no brothers or sisters of the intestate of the blood of the ancestor from whom the estate came by deed of gift from an ancestor who is living, the estate shall ascend to such ancestor. G. C. § 8573 as amended in 110 Ohio Laws 13.

(2)

(a) A husband, with his wife's knowledge, but without her express consent, caused a new roof to be built upon a house standing on her premises. Can an action by the roofer against the wife be maintained?

(b) What is meant by the right to estovers?

(a) Yes.

G. C. § 8318 says "when a married woman is owner of any boat, vessel, or other water craft or the owner of the land on which any house, mill, manufactory or other building, appurtenance, fixture, bridge or other structure, or any gas well, oil well or other well, oil derrick, oil tank, oil or gas pipe line is constructed, erected, altered or repaired, or to which it is removed, as mentioned in section one hereof, or is the owner of the lands on which any such street, turnpike, road, sidewalk, way, drain, ditch or sewer is constructed, altered or repaired, or of lands abutting thereon, as mentioned in section two hereof, and has knowledge of any such construction, erection, alteration, repair or removal, as mentioned in said sections one and two, this being done under a contract with the husband of such woman and without her express objection, he shall be held to be the duly authorized agent of his wife therein.

"A wife is held to be personally liable for repairs to a building on her land, made under contract with her husband, but with her knowledge and without protest from her." Frank Heller v. Annie Hohman, 12 C. C. 216, 5 C. D. 338.

"It is true that this section, 8318, is one under the mechanic's lien law, and would authorize a lien to be taken out on the property of the wife under such circumstances. But in our judgment, it is not limited to this with the view of preventing fraud and injustice; it goes further and makes her personally liable on the contract made by her husband for repairs on her property, if she knew the work was being done and made no objection thereto. The husband by the terms of the statute, is made the duly authorized agent of the wife therein. That is, as to the contract itself. It is a wholesome provision and should be upheld by the courts." Idem at p. 218.

(b) Estovers is the right or privilege which a tenant has to furnish himself with so much wood from the demised premises as may be sufficient or necessary for his fuel, fences, and other agricultural operations. Bouvier's Law Dictionary, Baldwin's Revision.

A tenant for life or years, but not a tenant at will is entitled to cut and appropriate a reasonable quantity of timber for the purpose of repairing buildings, fences, gates and the like which were upon the premises at the time of the demise, and also for repairing implements of husbandry and he may moreover take sufficient wood to burn in the house, or it seems, in houses occupied by his servants. The timber which he is thus entitled to take is known as "estovers" or "botes." Tiffany on Real Property, p. 961.

(3)

(a) What is a base fee?

(b) What is a base line?

(c) What is meant by the right to a homestead in Ohio?

(d) What becomes of an action for dower if the plaintiff dies before final judgment therein?

(a) A fee which has a qualification annexed to it, and which must be determined whenever the annexed qualification requires. The proprietor of such a fee has all the rights of the owner of a fee-simple until his estate is determined. Bouvier's Law Dictionary, Baldwin's Revision.

A determinable fee is an estate in fee simple, which, however, may be terminated by the happening of some contingency expressed in the instrument creating the estate. In many cases, and by many writers, the terms

"base fee" and "qualified fee' are used interchangeably with "determinable fee". Burdick on Real Property p. 292.

(b) Base line—A very accurately measured line on the earth's surface, from whose known length other lines in a survey are determined: hence called a base line. Funk and Wagnalls Dictionary, p. 232.

(c) The right to claim exemption of property from sale on judgment or order and the like of a homestead of the value of $1000 or if there is no homestead, then personal property to the value of $500. G. C. §§ 11730 to 11739.

"Husband and wife living together, a widow or widower living with an unmarried daughter or unmarried minor son, may hold exempt from sale on judgment or order a family homestead not exceeding $1000 in value. The husband, or in the case of his failure or refusal, the wife may make the demand therefor, but neither can be allowed such demand, if the other has a homestead. In case of assignment, for the benefit of creditors, upon filing the written consent of husband and wife to the sale of a homestead property exempt by law, such homestead may be sold subject to the dower and homestead right herein provided." G. C. § 11730.

"When a homestead is sold to pay a lien which precludes the allowance thereof, the residue of the proceeds, not exceeding five hundred dollars, shall be paid to the widow, or in case there be no widow, to the minor child, unmarried, in lieu of a homestead, on her or such child's application, in person, by agent, attorney, or guardian." G. C. § 11733.

(d) "When a plaintiff dies before the assignment of dower, or before entry of the final judgment, the action may be revived in the name of the executor or administrator. The court shall proceed to hear and determine, if not before decided, whether the plaintiff was entitled to dower in such action. If found so entitled, it shall adjudge in favor of such executor or administrator a sum equal to one-third of the rental value of the real estate in which the plaintiff was entitled to dower, from the filing of the petition until death, after deducting one-third of the necessary expenses. The sum so adjudged in favor of such executor or administrator shall be a lien upon such real estate, and its payment may be enforced by sale as upon execution. G. C. § 12008.

"Where a widow dies before final decree in a case, in which she, by answer and cross-petition asked for sale and dower of proceeds, action may be revived in the name of her administrator, who would be entitled to the value of dower from the time of filing of the answer and cross-petition up to her death." Renner v. Bird, 7 D. Repr. 290, 2 B. 76.

(4)

(a) Who has the legal title after the condition of a mortgage on real estate has been broken?

(b) If A devises an estate tail to B, and B dies without issue surviving, who takes upon the death of B?

(a) The mortgagee.

As between the mortgagor and mortgagee in a mortgage upon real estate, after condition broken, the legal title to the mortgaged premises is in the mortgagee, and he may elect, either foreclosure and sale, or bring ejectment to recover possession of the premises. Bradfield v. Hale, 67 O. S. 316, 65 N. E. 1008.

(b) If there are no heirs of the particular class to whom the estate is limited, the property reverts to the donor. 10 R. C. L. p. 658.

In Ohio, a fee simple estate vests in the issue of the first donee in tail and not in the donee himself according to G. C. § 8622. Hence when the grantee dies without heirs, the property reverts to the donor.

(5)

(a) Can the title to real property in Ohio ever be in abeyance?

(b) In measuring a certain tract of land it was found that the boundaries as set forth in the deed do not enclose the number of acres described therein.

In construing the deed, which shall control—the boundaries or the acreage?

(a) No.

In Ohio the title to real property can not be in abeyance. Knisely v. Young, 15 C. C. (N. S.) 49, 23 C. D. 439, citing Gilpin v. Williams, 25 O. S. 283.

It is well settled by the courts in this state that title to real estate must rest somewhere. It cannot rest in nubibus.

In some jurisdictions it is held that the title may be in abeyance but it is otherwise held in this state. Gilpin v. Williams, 25 O. S. 283-295.

This principle has been one of the important factors in shaping the modern law governing future interests in real property.

(b) Boundaries.

"Quite frequently the quantity or estimated quantity of the land is named in the conveyance, but this is considered inferior as an indication of the location of the boundaries to the elements of courses, and distances, and if inconsistent must yield to calls for courses and distances as

well as to calls for monuments." Tiffany on Real Property p. 1654.

"A description by quantity must yield to a description by metes and bounds." Busch v. Wilgus, 24 N. P. (N. S.) 126.

Boundary controls quantity. Hamil v. Carr, 21 O. S. 258 at p. 276.

(6)

Mrs. Brown, a resident of Illinois, died intestate leaving a husband, but no children. At the time of her death, she was the owner of a piece of real property located in Ohio that came to her by descent from her father and mother, both of whom died intestate leaving her as their only heir at law. What estate, if any, or what interest, if any, has the husband in said real estate, or to whom does it descend under the laws of Ohio?

The property will descend by G. C. § 8573 to, and vest in the husband, during his life.

If such intestate leave no husband relict of herself, or at the death of such relict, the estate shall pass to and vest in the parents of such intestate and the survivor of such parents during the life of such parents and such survivor of them. If there are no such parents, or upon the death of both of such parents, the estate shall pass to and vest in the brothers and sisters of the intestate who are of the blood of the ancestor from whom the estate came, or their legal representatives, whether such brothers and sisters be of the whole or half blood of the intestate. G. C. §8573-sub. 3 as amended in 110 Ohio Laws 13.

However, if this question means that Mrs. Brown had no other living heirs, except her husband then G. C. § 8575 will govern which provides that a husband relict of the wife shall take an estate of inheritance (fee simple) in property coming by G. C. § 8573, if there are no other persons who may inherit under the provisions of that section.

(7)

A died testate, resident of Ohio, and in his last will and testament directed his executor therein named to convert his real property into cash and after the payment of his debts, divide the proceeds among his four children, share and share alike. Jones who was named executor under the will died before he qualified as such executor and Smith was thereupon appointed administrator with the will annexed. Smith proceeded to sell the real estate belonging to A and did convert the same into cash, making proper deeds to the purchasers thereof.

C, one of A's children, was a minor at the time of his father's death, and upon obtaining his majority brought a suit to set aside said deeds, alleging that Smith had no power as such administrator with the will annexed to sell said real estate or execute such deeds under said will.

What is your opinion as to whether or not C has a right to maintain said action?

The answer to this question depends entirely on whether the power to sell was personal to the executor or annexed to the office itself. From the facts stated, it appears that the intention of the testator was that such power of sale should not be an attribute of office and therefore C can maintain his action.

The rule laid down in Westwater v. Guitner is as follows:

"If a will confers upon the executor the power to sell realty, and such power is personal, the administrator with a will annexed does not possess such power. If on the other hand, the will shows that such power is a part of the trust it passes to the administrator with the will annexed.

The power here conferred by the will may be regarded as purely personal and the present administrator has no power to sell the real estate without an order of court. idem at p. 259. Westwater v. Guitner, 18 N. P. (N. S.) 209 at p. 259, 30 D. (N. P.) 370.

It might be well at this point, to explain that, by an "administrator with the will annexed", is meant the administrator who is appointed by the court where for any cause the executorship becomes vacant. See Walker. Am. L. 304.

(8)

A, B, C and D were tenants in common as the only heirs at law of John Jones, of 160 acres located in Ohio, the widow having preceded her husband in death. A conveyed his undivided one-fourth interest for a consideration of one dollar to B. The farm remained intact. B died intestate one month after receiving said deed from A leaving a widow but no children surviving him, their being no issue of their said marriage. After one year, she brought suit in partition claiming she was the owner in fee simple of the undivided one-half of said farm. A, C and D denied her claim to the one-half of said farm in fee simple.

What were the respective interests and rights of said parties to said farm?

The widow gets a fee simple to the one-fourth which came to her husband by purchase from his brother, but she only takes a life interest in the one-fourth, which came to her husband by descent.

Upon the death of the widow, the brothers A, C and D will get the fee to the one-fourth in which the widow had but a life interest according to G. C. § 8573-sub. 3.

Of course C and D will retain their undivided one-fourth in fee simple.

When B purchased A's share, it changed the character of that share from ancestral to non-ancestral, and it must descend to the wife in fee according to G. C. § 8574-sub. 2.

However, this purchase in no way affected B's share of ancestral property in which the widow could take only a life estate according to G. C. § 8573-sub. 2.

The following case of Huseman v. Fingermeyer et al, involves the same principle—Five coparceners entered into an amicable partition of land descended from a common ancestor. The land was surveyed and divided into tracts of equal area but of unequal value. By arrangement of the heirs, each of them could bid for a farmhouse, or homestead located upon one of the tracts, and the highest bidder was to have a quitclaim deed therefore from the other heirs. It was not agreed by nor was it within the contemplation of the heirs that this building was to be removed. After competitive bidding, one coparcener, C. H., bid $2,975 for the homestead, and received from the others a quitclaim deed therefor. This sum was equally distributed among the several coparceners. Mutual releases were executed for the other four tracts taken by the other heirs. Held; To the extent of one-fifth of the tract selected by her, C. H. took title by descent, which upon her dying intestate passed under G. C. § 8573. To the extent of the remaining title acquired by her under amicable partition as aforesaid, she obtained the title thereto by purchase, which upon her intestacy, passed under the provisions of G. C. § 8574. Huseman v. Fingermeyer et al, 106 O. S. 113, 139 N. E. 862.

(9)

A died testate leaving his real estate to his widow for life and after her death to his two children B and C, share and share alike. After the estate had been fully settled, and while the widow was still living, one of the children brought suit in partition to have his interest set off to him in severalty and if the same could not be done, that said real estate be sold and the proceeds divided according to law. B the other child and heir at law filed a demurrer to the petition on the ground that C had no right to maintain the action.

What was the ruling of the court on the demurrer? Give reasons.

The demurrer should be sustained.

"Neither reversioners nor remaindermen can have partition, the right only extending to those who have the possession, or an immediate right to the possession of the lands sought to be partitioned." Tabler v. Wiseman, 2 O. S. 207; Davison v. Wolfe, 9 O. 73.

Where there is an outstanding life estate, neither a reversioner nor remainderman can maintain an action for partition. Elrod v. Bass, 1 C. C. 39, 1 C. D. 23.

The right to partition only extends to those who have the possession or immediate right to the possession of the lands sought to be partitioned. Burbeck v. Spollem, 6 D. Repr. 1118, 10 Am. L. Rec. 491.

(10)

A leased real estate to B for a period of ninety-nine years renewable forever. B died intestate and left a widow and one child. What right, if any, has the administrator to administer upon said lease and what interest, if any, has B's widow in the same?

The widow of B gets dower in the lease, and the administrator has no right to administer upon said lease.

G. C. § 8597 makes permanent leasehold estates renewable forever descend as realty. When property descends as realty, the administrator has no right to it, because it goes directly to the heir.

The case of "The Ralston Steel Car Co. v. Annie M. Ralston" has just been decided by the supreme court, and it was held that where the owner of real estate leases the same to another and to his heirs and assigns for a term of ninety-nine years, renewable forever, the estate created by such instrument becomes a freehold estate in real property and becomes subject to the laws of descent as an estate in fee; furthermore such an estate is subject to dower under the provisions of G. C. § 8606.

This case was decided on March 24, 1925 and has not yet been reported but will doubtless appear in Volume 112 of the Ohio State Reports.

Outside of dower the widow would get nothing, since the property would descend to the child under G. C. § 8574-1.

(11)

Name the essential parts of a warranty deed conveying a deed in fee simple and what is necessary to make it a valid deed under the laws of Ohio?

1. Premises
2. Habendum
3. Tenendum

4. Reddendum
5. Conditions
6. Warranties
7. Covenants

See Burdick on Real Property, p. 750.

A deed, mortgage, or lease of any estate or interest in real property, must be signed by the grantor, mortgagor, or lessor in the presence of two witnesses, who shall attest the signing and subscribe their names to the attestation. Such signing also must be acknowledged by the grantor, mortgagor, or lessor before a judge of a court of record in this state, or a clerk thereof, a county auditor, county surveyor, notary public, mayor, or justice of the peace, who shall certify the acknowledgment on the same sheet on which the instrument is written or printed, and subscribe his name thereto. G. C. § 8510.

The husband or wife of the grantor should be joined in the deed since a married woman, owner of the fee of land, 'does not pass her title by a deed executed by husband and wife, unless she joins in the granting clause." Purcell v. Goshorn, 17 O. 105.

The deed should also contain the names of the parties; and all the parts of a formal deed mentioned in the first part of this question should be incorporated therein.

The deed should be recorded in the office of the recorder of the county in which the premises are situated. G. C. § 8543.

(12)

A executes a deed for certain land to his daughter and hands same to Mr. Jones with the instruction to keep it and deliver deed to his daughter in the event of his death, and should he get well he will call for it. Some time after this A dies and Mr. Jones delivers deed to his daughter. You are called upon for an opinion as to whether or not the daughter has a valid title under the deed. What would you advise, and why?

I would advise that the daughter has no title. "A, having executed in due form, a deed of gift of real estate to his son, said to B; "take this deed and keep it. If I get well I will call for it. If I don't, give it to Billy", the grantee. A was then ill and died within a few days thereafter of the same illness and B then handed the deed to the grantee, who caused it to be recorded. Held:—That this did not constitute a delivery, and the instrument was invalid as a deed. Williams v. Schatz, 42 O. S. 47.

The reason that this did not constitute a valid delivery was that Mr. Jones was the agent of the grantor, A, and not of the daughter and thus the deed was revocable at any

time before the death of the grantor since he did not part with its possession or dominion during his life. Idem. at p. 50.

(13)

A comes into your office and tells you that he has an option to purchase Lot 371 in your city from B, but before buying same, he wants you to look up the title in the name of B the present owner. What records in the court house would you examine, and what for?

1. Mortgage records;
2. Mechanics lien records; leases, miscellaneous;
3. Pending suits and living judgments in state and Federal Courts;
4. Municipal assessments for streets, sidewalks, sewering or oiling;
5. Probate records, if probate proceedings are in the chain of title;
6. Sheriff's office for foreign executions;
7. Treasurer's office for taxes.

These records are located in the court house in the county where the property is situated.

(14)

Richard Roe and May Roe are husband and wife. They have no children, but each has brothers and sisters. Mr. Roe is the owner of a section of ancestral land. He makes a warranty deed for same to his friend Y with the understanding that it should be deeded to Mrs. Roe. After the death of Mr. Roe, Y conveyed said section of land by warranty deed to Mrs. Roe. Mrs. Roe dies intestate, the owner of the land. You are called upon for an opinion by the brothers and sisters of Mr. Roe as to whether or not they are entitled to this land as his heirs. What would you advise, and why?

I would advise that they are not entitled to one-half of this land by virtue of G. C. § 8577. In the present case, the property came to Mrs. Roe by purchase. It is held in Thiessen v. Moore, 105 O. S. 401, 137 N. E. 906, that, for the purpose of determining the course of descent, the recital in a deed of a valuable consideration is conclusive and requires the property to pass under G. C. § 8574.

(15)

X comes into your office to have a deed made to B for certain real estate. You make the deed and read it to him and when you come to that part of the deed which contains the convenant of warranty, he asks you what that means. What answer would you give him?

The covenant of warranty promises indemnity against

any existing claims which may be presented in the future and is neither more nor less than a covenant for quiet enjoyment.

It runs with the land, ie, it enures to every successive owner till eviction, though the words "heirs and assigns" are not used.

It is said in King v. Kerr's Admr's: "The covenant of warranty in a deed conveying land, or any interest in land, is an undertaking by the warrantor, that on the failure of the title which the deed purports to convey, either for the whole estate or for a part only, by the setting up a superior title, that he will make compensation in money, for the loss sustained by such failure of title. It is commonly, in express terms extended to the heir and assignee of the grantee, but this is immaterial. This covenant is not broken until the grantee, his heir or assignee, is evicted from or disturbed in the enjoyment of the premises or a part of them, by the setting up of a superior, or paramount title. It is like the covenant of quiet enjoyment in a lease. The covenant of warranty, as respects the grantee, is not merely a personal covenant, for the breach of which he or his executors or administrators only could sue; but it has respect to the land, is a real covenant, and until broken, passes with land to the heirs of the grantee; or if the land is conveyed or assigned to the assignee, and when broken, the heir or assignee injured by the breach can, in his own name, sustain an action against the warrantor. King v. Kerr's Admr's, 5 O. 155 at p. 156.

(16)

(a) What is meant by the term "tenure" under the Feudal system of land holding in England?

(b) What, if any, significance has the term "tenure" now with respect to land held as an estate of inheritance in Ohio?

(a) By the term "tenure" is meant THE MANNER IN WHICH VASSALS HELD THEIR FEUDS UNDER CERTAIN PRINCIPAL OFFICERS, WHO IN TURN, HELD UNDER A LORD PARAMOUNT.

(b) The ancient notions of tenure do not exist here even in theory, as they do in some of the older states. Our citizens hold of no superior. What they own, they own absolutely and independently. ALL ESTATES ARE IN THE BROADEST SENSE OF THE WORD ALLODIAL.

The only provision which bears the most remote analogy to the doctrine of holding of a superior, is that the people of the state, in their collective and sovereign capacity, have an ultimate right to all land within their jurisdiction. When it so happens that there is no other legal owner the law makes it escheat to them, and this right of escheat

bears some resemblance to that of lord paramount. But it has its origin in the most obvious considerations of public policy, and can in no sense be regared as a relic of the feudal system. Walker's American Law, p. 314, 315.

(17)

(a) In what respect does the estate of the first donee in any estate in fee tail differ from a life estate?

(b) In the case of an estate in fee tail, does the issue of the first donee in tail take by descent from the first donee, or by purchase under the instrument creating the estate in fee tail?

(a) The first donee in an estate in fee tail gets what might be called a fee simple for life, that is, if the donee in tail dies, the husband or wife relict as the case may be, has a right to dower, while in a life estate there is no such right upon the party who survives the holder of the life estate.

G. C. § 8606, on dower in Ohio says that "A widow or widower who has not relinquished or been barred of it, shall be endowed of an estate for life in one-third of all the real property of which the deceased consort was seized AS AN ESTATE OF INHERITANCE at any time during the marriage, etc.

The case of HARKNESS v. CORNING, 24 O. S. 416, holds that the statute to restrict the entailment of real estate (G. C. § 8622) does not change the nature of an estate in the first donee in tail from an inheritable estate to an estate for life merely. The object of the statute is to restrict the entailment to the immediate issue of such donee, and, on the determination of his interest in the estate and of such rights as the law annexed to it while held by him, to enlarge the estate tail in the hands of such issue into an absolute estate in fee simple.

"One of the incidents of an estate in fee tail, at common law, is the right of the surviving husband to an estate by curtesy, with which the statute above referred to does not interfere, and to which, in this state, the husband is entitled, whether there is issue born during coverture or not." Harkness v. Corning, 24 O. S. 416.

Of course curtesy has been abolished in Ohio, and dower substituted by G. C. § 8606, but the same principle applies.

Moreover, a donee in tail is not liable for waste (17 O. S. 439, 446) while a person holding a life estate is liable. G. C. § 8593 reads "A TENANT FOR LIFE in real property, who commits or suffers waste thereto, shall forfeit that part of real property of which such waste is committed or suffered, to the person having the immediate estate in reversion or remainder. Such tenant also will be liable in damages to the

person having the immediate estate in reversion or remainder for the waste committed or suffered thereto."

(b) The issue takes by descent. In a fee tail estate, the words "heirs of his body" used in the conveyance are words of limitation and not of purchase and hence the issue takes not as a purchaser, but by descent. Pollock v. Speidel 17 O. S. 439 at p. 449.

(18)

A, B and C, brothers, were tenants in common in equal shares in a certain tract of land which came to them by devise from their father. Thereafter A instituted partition proceedings with respect to said premises against B and C, and it being found impracticable to divide the premises, the same were ordered by the court to be sold. At the sheriff's sale of said property C was the highest bidder for said property and the same was on order of the court sold and conveyed to C on his delivery to the sheriff of that part of the purchase price represented by the shares of A and B. Some time thereafter C died intestate, seized of said property, and leaving him surviving his widow D, and his said brothers A and B, his only heir and next of kin. What are the respective rights and interests taken in said premises by said A, B and D?

Give reasons for answer.

D takes a fee-simple in two-thirds of the property and a life estate in one-third; A and B take a fee-simple in the one-third which came by descent upon the death of D.

When C acquired the interest of A and B, such property passes to him by purchase at the sheriff's sale. Hence upon the death of C, such interest must pass under G. C. § 8574-2 which provides "If there are no children, or their legal representatives, the estate shall pass to and be vested in the husband or wife, relict of such intestate."

The remaining one-third of the property passed to C by descent inasmuch as the mere fact of partition did not convert it into non-ancestral property; for partition does not of itself break the chain, only separating possession, and does not disturb the title under which one holds. Tabler v. Wiseman, 2 O. S. 208.

Therefore it must pass on his death as ancestral property, according to G. C. § 8573-2. This section provides the wife shall get a life estate; upon her death, however, this same section provides that the property will descend to the brothers, A and B, since there are no parents. G. C. § 8573-3. Huseman v. Fingermeyer, 106 O. S. 113, 139 N. E. 862.

(19)

In what respects do the legal consequences of a failure to file a mortgage on real property for record, differ from

those following the failure to file a deed for record, with respect to the rights of subsequent judgment creditors of the mortgagor in the one case, and of the grantor in the deed in the other? Give reasons for your answer.

In the case of a mortgage, the Ohio Statute, G. C. § 8542, provides that all mortgages take effect from the time they are delivered for record; hence a judgment creditor being in privity with the mortgagor can claim his rights against the mortgagor, when the mortgagee fails to file it for record. Betz v. Snyder, 48 O. S. 492, 28 N. E. 234.

"As to third persons, a mortgage takes effect, either at law or in equity, only from the time it is properly filed for record." Dow v. Union Bank, 87 O. S. 173, 100 N. E. 328.

In the case of a deed, G. C. § 8543 provides that an unrecorded deed is deemed fraudulent so far as relates to a subsequent bona fide purchaser having at the time of purchase, no knowledge of the existence of such former deed or instrument. Hence the judgment creditor in an unrecorded deed, being in privity with the grantor has no rights in the property, because he takes with notice and is not a bona fide purchaser.

A duly executed deed is ineffectual to convey property, as against a subsequent purchaser without notice, until it is filed for record. Wright v. Bank, 59 O. S. 80, 51 N. E. 876.

(20)

(a) What is the nature of the interest of the vendee in possession of real property under a land contract, where he has paid part of the purchase price and under the contract is to receive a deed for the property when the balance of the purchase price is paid?

(b) In the above situation what is the nature of the interest of the vendor in said real property?

(c) By what means may the respective interests of said vendor and vendee be subjected to the claims of judgment creditors?

(a) In the case of a sale of land, where the vendee is in possession under a contract whereby he is to receive a deed when the purchase price is paid, he thereby becomes a TRUSTEE FOR THE VENDOR OF THE PURCHASE PRICE, and owns an equitable estate in the premises. Walker's American Law, p. 383.

(b) The vendor on the other hand becomes TRUSTEE UNDER THE CONTRACT, HOLDING THE LEGAL TITLE FOR THE PURCHASER. Wagner v. Sheppard, 17 N. P. (N. S.) 613, 25 D. 462.

(c) The interest of the vendor is subject to levy by attachment on the land, and it is not essential that garnishee process be served on the vendee. Coggshall v. Marine Bank Co., 63 O. S. 88, 57 N. E. 1086.

The interest of the vendee in the possession of real estate under a contract of purchase, the legal title being in the vendor, is a vested interest within the meaning of that phrase as used in G. C. § 11655, and such interest is bound under the provisions of G. C. § 11656, for the satisfaction of a judgment against such vendee. Bank v. Logue, 89 O. S. 288, 106 N. E. 21.

(21)

A, being the owner of certain premises, leased the same to B for five years by a written lease which was defective because the same was not acknowledged by A. Thereafter, before said lease was filed for record, A sold and conveyed the premises to C, who did not know that said lease had been executed but did know that B was in possession of the premises and was conducting a shoe store therein. Under these facts, what if any rights has B as against C with respect to said written lease?

Give reasons for your answer.

B has a right to specific performance of the contract while C acquires the ownership from the vendor subject to the equitable rights of the lessee in possession.

"A lease of real property for a term of years, properly signed by both parties, but acknowledged by the lessee only, operates to create an equitable estate in the lessee.

One who purchases realty which at the time is in the possession of a lessee under a defectively executed lease, and who at the time of the purchase, is aware of the possession of the premises, by such lessee, acquires the ownership from the vendor subject to the equitable rights of the lessee in possession." Schloss v. Brown et al., 13 App. 294.

The lease to B, though not attested as required by G. C. § 8510 was good between the parties as a contract. An imperfectly executed LEASE may operate to create an equitable estate in the lessee, if it be plainly shown that the instrument was intended as a lease and was accepted and treated as such BY THE LESSEE. Under G. C. § 8543, a lease for five years is deemed fraudulent until it is recorded or filed for record in the office of the recorder, so far as it relates to a subsequent bona fide purchaser, having at the time of purchase, no knowledge of the existence of such lease. If C was not a bona fide purchaser, he would take the property subject to the equitable right which is now admitted to have existed against A.

It is the settled rule in Ohio, that a purchaser of land which is in the actual possession of a third party, known to him, is chargeable with notice of any equitable title of the party in possession whatever the same may prove to be. The undisputed evidence shows that C was aware of the possession of the premises by B. Hence he acquired the ownership from A subject to the equitable rights of B aris-

ing under the unrecorded contract of lease. 13 App. 294 at p. 296, 297.

(22)

M arranged to sell a ball park to F. As a matter of fact R, S and T put up three-quarters of the purchase price. F took title and then claimed the park was all his. R, S and T sued to have the court order conveyances to them of part interests in proportion to the amounts they had advanced.

Should the court do so, and why?

What is the effect of the statute of frauds on the situation?

Yes.

The statute of frauds does not affect the situation.

If one pays the money for land purchased and takes a deed to another, a trust results, by implication of law to him who paid the money, because he is deemed the real purchaser. This is analogous to feoffment at common law, where the use followed the consideration. Where an estate is purchased in the name of A and the consideration money is actually paid at the time by B, there is a resulting trust in favor of B, provided the payment of the money be clearly proved. The payment of the money at the time is indispensable to the creation of the trust. Fleming v. Donahoe, 5 O. 255, 256: Williams v. Van Tuyl, 2 O.S. 337, 338; see also, Reynolds v. Morris, 17 O.S. 510.

Previous to the enactment of the statute of frauds of this state, a trust might be created in real estate by parol, and established by parol evidence, and there is nothing in our statute which prevents the establishment of an express trust in lands by evidence of the same kind. By the 7th section of the English statute of frauds, it is required that all declarations or creations of trusts of lands, shall be manifested and proved by some writing signed by the party who is by law enabled to declare the trust. But this section and the 8th and 9th sections of that statute in relation to trusts, are omitted from our statute, and express trusts are allowed to be proved by parol evidence as well as resulting trusts which arise by operation of law, and are unaffected by the statute. Harvey v. Gardner, 41 O.S. 642, 645, 646.

(23)

Smith conveyed Whiteacre to Brown, the deed stating that one dollar and valuable considerations were the consideration of the transfer, and that Smith acknowledged receipt of them all. Smith later claimed that only $1,200 had been paid out of $1,500 called for in the agreement for the purchase. When Brown refused to pay, Smith sued.

Should he recover, and why?

Yes.

The consideration clause of a deed of conveyance is conclusive for the purpose of giving effect to the operative words of the deed, but for every other purpose it is open to explanation by parol proof and is prima facie evidence only of the amount, kind and receipt of the consideration. Shehy v. Cunningham, 81 O.S. 289.

(24)

Jones was a squatter on a five acre wood lot, and cleared one acre of it for his house and truck garden. He made no effort to use the balance of the lot. White came to the five acre lot about the same time, having a paper which purported to give him title to the whole lot, and which he recorded. He cleared another acre of woods for his house and garden, but likewise did not try to do anything with the wooded part of the lot or with Jones' lot. They lived there for twenty-five years and at the end of that period a suit was filed by X, Y and Z as heirs of the true owner, to eject both Jones and White from the five acre lot. How should the court rule (a) as to White's acre (b) Jones' acre and (c) the three acres of woods, and why?

(a) The court should rule for White.
(b) The court should rule for Jones.
(c) The heirs should get the three acres of woods.

We think that under our statutes of limitation (G.C.§ 11219), if a party establish in himself, or in connection with those under whom he claims, an actual, notorious, continuous and exclusive possession of land for a period of twenty-one years, he thereby, except as to persons under disability, acquires a title to the land; and this, irrespective of any question of motive or of mistake. Yetzer v. Thoman, 17 O.S. 130, 132.

In this state it is not necessary to the running of the statute that possession be held under color of title. Where there is possession of the requisite character, the question, whether there is color of title or not, is wholly immaterial. McNeeley v. Langan, 22 O.S. 32, 37.

(25)

(a) If the owner of a house leases a portion of it to which access is had by way of halls and stairways, to be used by such tenant in common with the owner and other tenants, and the railing becomes in a defective condition, is the landlord liable for any injuries arising from his failure to keep the same in proper condition of repair? And if so, does such liability extend to employes, guests and invitees of such tenant?

(b) D, the owner of certain premises, leased the same to several tenants, and had also leased the basement of said premises to another tenant, the other tenants had access to

the cellar for the purpose of reaching pipes which supplied the entire building with water. D had no property in the cellar and retained no control thereof. H fell into an open cellarway, the door of which had been left open by a tenant. Is D, the lessor, liable?

(a) Yes.

Yes.

If the owner of a house leases a portion of it, to which access is had by ways of halls, stairways or other approaches, to be used by such tenant in common with the owner or tenants of the other portions of the premises and retains the possession and control of such halls, stairways or other approaches, it is his duty to exercise ordinary care to keep the same in a reasonably safe condition.

Where a porch and stairway leading thereto are provided, maintained, and controlled by a landlord for the use of several tenants of his building, and are thus used, he is, in general, liable for any injuries arising from his neglect to keep the same in proper repair; such duty and liability extend not only to the tenant himself, but also to members of his family, employees, guests and invitees. Davis v. Kelley, 112 O.S. 122.

(b) No.

A tenant will not be permitted to recover from her landlord for personal injuries caused by a fall through an open cellar door in a common passageway, where no claim is made that the landlord or his servant was in any way responsible for the door being left open and there had been no change in the passageway of the cellar door during the tenancy. Stinson v. Metzger, 4 App. 290.

(26)

James Smith has a life estate in certain premises. John, George and Mary Smith each own one-third of the remainder.

(a) Can John Smith maintain a proceeding in partition?

(b) Can John Smith bring an action to quiet title against parties claiming an adverse interest?

(c) Can John Smith bring an action in ejectment against a tenant of James Smith?

(d) Can John Smith enjoin the commission of waste by life tenant or anyone claiming under the life tenant?

(a) No.

That the remainderman cannot have partition, where a life estate intervenes, has been decided in the following cases: Tabler v. Wiseman, 2 O.S. 208; Eberle v. Gaier, 89 O.S. 118, 105 N.E. 282; Embleton v. McMechen, 110 O.S. 18, 26; Rawson v. Brown, 104 O.S. 537, 540.

(b) Yes.

An action may be brought by a person in possession of real property, by himself or tenant, against any person who claims an estate or interest therein, adverse to his for the purpose of determining such adverse estate or interest; or such action may be brought by a person out of possession, having, or claiming to have, an estate or interest in remainder or reversion in real property, against any person who claims to have an estate or interest therein, adverse to him, for the purpose of determining the interest of the parties therein. G.C.§ 11901.

The amendment of R.S.§ 5779 (G.C.§ 11901) means that where a person is out of possession, claiming an estate in reversion or remainder in the whole premises, that he may bring his action to have his rights determined by the court. Jenkins v. Artz, 7 N.P. 371, 373; see also, Ling v. Strowe, 12 C.C.(N.S.) 161.

(c) No.

In an action for the recovery of real property, it shall be sufficient if the plaintiff states in his petition that he has a legal estate therein and IS ENTITLED TO THE POSSESSION thereof, describing it with such certainty as to identify the property, and that the defendant unlawfully keeps him out of the possession. It shall not be necessary to state how the plaintiff's estate or ownership is derived. G.C.§ 11903.

A suit in ejectment cannot be maintained where there is an outstanding title, for the reason that under such circumstances the right to immediate possession cannot be claimed. State v. Cincinnati Tin & Japan Co., 21 C.C. 218; aff. 62 O.S. 82.

(d) Yes, as to life tenant.

No, as to one claiming under life tenant.

A tenant for life in real property, who commits or suffers waste thereto, shall forfeit that part of the real property of which such waste is committed or suffered, to the person having the immediate estate in reversion or remainder. Such tenant also will be liable in damages to the person having the immediate estate in reversion or remainder for the waste committed or suffered thereto. G.C.§ 8593.

No person is entitled to an action of waste against a tenant for life but he who has the immediate estate of inheritance expectant on the determination of the estate for life. Hatch v. Hatch, 1 D. 271, 31 B. 57.

(27)

A buys a farm upon which there is a prior unrecorded mortgage of which he has full knowledge, and which he knows has not been paid. What if any effect had the mortgage upon his title?

None.

All mortgages, executed agreeably to the provisions of this chapter, shall be recorded in the office of the recorder of the county in which the mortgaged premises are situated, and take effect from the time they are delivered to the recorder of the proper county for record. * * *. G.C.§ 8542.

Since the enactment of that statute it has uniformly been held, and in many cases, that until the mortgage is properly deposited for record, it is without effect, either at law or in equity, as against a third person who acquires an interest in or lien on the property, although he acquired it with knowledge of the existence of the mortgage. This results from the language of the statute requiring such instruments to be recorded, and declaring that they shall take effect from the time they are delivered for record; the object of the statute being, it is held, to avoid all questions of notice other than to be obtained from an examination of the record. Gas Co. v. Tiffin, 59 O.S. 420, 440, 441.

(28)

Wife joins husband in a mortgage for husband's debt. Subsequently B recovers judgment against husband for $500. Land forced to sale and all but $800 is consumed in paying mortgage and costs. Should the wife's dower be estimated upon the entire proceeds of sale or upon the residue after paying the mortgage?

Upon the entire proceeds of sale.

It follows that a widow who, as wife joined in mortgaging her husband's land to secure payment of his debt, is entitled to dower in all of the land, subject only to the right of the holder of the mortgage debt to full payment. Kling v. Ballentine, 40 O.S. 391, 395, 396.

Where a wife joins the husband in a mortgage on real property in which she has a dower interest and which is sold on foreclosure, for more than the mortgage debt, she is dowable of the entire proceeds of the sale. Soc. for Sav. v. Drake, 10 C.C. 59, 6 C.D. 31.

(29)

A and B are the owners of adjacent farms. On A's farm was a spring fed by waters percolating through the earth. B dug a well on his farm which cut off the supply of water from A's spring. What remedy has A?

None.

In the absence of express contract and positive legislation, as between proprietors of adjoining lands, the law recognizes no correlative rights in respect to underground waters percolating, oozing or filtrating through the earth. Frazier v. Brown, 12 O.S. 294.

No right by prescription can exist as to percolating water, nor is one prevented from making any lawful and legiti-

mate use of his own land, by digging or otherwise, even though the effect is to drain a spring on the land of an adjoining proprietor. Injury to the spring, therefore, by draining it, or cutting off water supplied to it by percolation, would not be, per se, actionable. Elster v. Springfield, 49 O.S. 82, 84.

As between adjacent landowners, the rule of law seems to be that there is no right to recover for damages for loss of springs or wells fed by percolating water, and that, unless there is injury or damages to a subterranean stream or water in a known and fixed course and well defined channel, there can be no recovery. Collieries Co. v. Cocke, 107 O.S. 238, 258, 140 N.E. 356.

(30)

For how long a term may a valid lease of lands in Ohio be granted by parol? How long by written lease not acknowledged or witnessed?

1. For no length of time unless possession is taken to take it out of the Statute of Frauds.

G.C.§ 8620 provides:

No lease, estate or interest, either of freehold or term of years, or any uncertain interest of, in, or out of lands, tenements, or hereditaments, shall be assigned, or granted except by deed, or note in writing, signed by the party so assigning or granting it, or his agent thereunto lawfully authorized, by writing, or by act and operation of law.

An oral lease for a period of less than three years is invalid in Ohio unless possession is taken thereunder, but if possession is taken thereunder such oral lease is valid. Bumiller v. Walker, 95 O.S. 344, 348.

2. Three years.

Nothing in this chapter contained shall affect the validity of any lease of school or ministerial lands for any term not exceeding ten years; or of any other lands, for any other term not exceeding three years; or require such lease to be attested, acknowledged or recorded. G.C.§ 8517.

(31)

A having leased a house for three years at a stipulated rent, occupies the premises but six months when the same is destroyed by fire. Is he liable for rent for the unexpired term at common law? Is he liable under Ohio law?

1. Yes.
2. No.

If a tenant agrees expressly, whether under seal or not, to pay rent, and makes no reservation on account of unavoidable accidents, he is bound to pay the rent for the whole term, notwithstanding the premises in the meantime are destroyed by fire. Linn v. Ross & Co., 10 O. 412.

The rule, it is said, grew out of a custom founded upon the consideration that, as the destruction is usually by means of an accident for which neither lessor nor lessee is responsible, it is but equitable to divide the loss, and, as the lessor must lose the property, the lessee should lose the term, and the further reason that exemption from loss would tend to make the tenant less careful, and that the public, as well as landlord, is interested in the prevention of destruction of buildings by fire. Felix v. Griffiths, 56 O.S. 39, 44.

The lessee of a building which, without fault or neglect on his part, is destroyed or so injured by the elements, or other cause, as to be unfit for occupancy, shall not be liable to pay rent to the lessor or owner thereof, after such destruction or injury, unless otherwise expressly provided by written agreement or covenant. The lessee thereupon must surrender possession of the premises so leased. G.C.§ 8521; see also, Cain v. Brown, 105 O.S. 264, 268.

(32)

Has an abutting property owner any interest in the street in front of his abutting property? State reasons. Be brief!

Yes.

It is settled law in Ohio that a municipality does not own an absolute fee simple in the street, but that it owns only a determinable or qualified fee, and that the city is to hold its title to the real estate in the street in trust for street uses and street uses only, so that it may perform its statutory duty of keeping the streets open, in repair, and free from nuisance. Such a title necessarily implies that there is a substantial interest not conveyed which remains in the abutting owner. Sorg v. Oak Harbor, 20 App. 313, 315.

An owner of a lot abutting on such street has a property interest in the street in front of his lot which cannot be taken against his will except upon the terms provided by the constitution, viz: that a compensation shall first be made in money or by a deposit of money. Callen v. Electric Light Co., 66 O.S. 166.

While the abutting lot owner has the right of public travel on the street, and the right of ingress and egress from the street to his lots, the public authorities retain the right to improve the street, and place such means of travel thereon as in their judgment will best conserve the public welfare. And so long as his easement of ingress and egress is not materially injured, he is without remedy, because he is not wronged, said easement—all the property right he has in the street—not being interfered with. Traction Co. v. Parish, 67 O.S. 181, 191; Smith v. Central Power Co., 103 O.S. 681, 689.

(33)

A owns a house with considerable land around it. The water from the roof drains into sewer pipes, the ends of which are visible above the ground. These drain into an underground sewer under the contiguous land. A sells the house to B by warranty deed, making no mention of the sewer. A year later A sells the contiguous land to C, and still a year later C takes up the sewer. B sues C for interfering with his alleged easement. Discuss the rights of the parties.

B has a right of action against C to prevent interference with his easement.

It is stated as a general rule, that if there be a severance of a heritage into two parts, in respect to which there had been continuous and apparent easement used by the owner, such an easement would pass by implication with the dominant estate. Washburn "Real Property," Vol. II, §§ 274 et seq; Weber v. Miller, 9 C.C. 674, 678.

We think the law well settled in this state, whatever the decision may be in some of the others, and they are far from being in harmony, that, where an estate is divided as was this one, each takes his part, subject to or benefited by such burdens as were openly and plainly attached to or imposed on it by the common owner in his use and enjoyment of the land at the time of the severance, and which on a severance would probably be termed easements or servitudes. Frate v. Rimenik, 115 O.S. 11, 23, App. Baker v. Rice, 56 O.S. 463, 475, 47 N.E. 653, 655.

(34)

A lists his real estate with B, an agent, for sale. B negotiates the sale at the price A held his property for, with C and executes a contract of sale with C. A refuses to convey to C and C commences suit to compel a conveyance. Who prevails?

A.

A real estate broker is without authority to execute a contract of sale which shall be binding upon one who places real estate in his hands for sale unless such authority is specially conferred. Weatherhead v. Ettinger, 78 O.S. 104, 84 N.E. 598; App. in Spengler v. Sonnenberg, 88 O.S. 192, 199.

It is in accordance with common understanding that one soliciting the services of a real estate broker, when nothing more appears, reserves to himself the power to conclude the sale. Supra, p. 107.

(35)

Smith, without any negligence on his part, is injured by falling on the defective sidewalk located in front of Jones'

home on East Broad Street, a duly dedicated street in Columbus, Ohio. He sues Jones. Jones demurs. How should the court rule, and why?

The demurrer should be sustained.

Smith should have sued the city.

Municipal corporations shall have special power to regulate the use of the streets, to be exercised in the manner provided by law. The council shall have the care, supervision and control of public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts, and viaducts, within the corporation, and shall cause them to be kept open, in repair, and free from nuisance. G.C.§ 3714.

(36)

A agreed in a written statement to sell "a hundred acre farm" in Ashtabula county to B for $20,000. B tendered his money on the date set and A refused to convey. B brought an action in specific performance. Who prevailed? Give brief reasons for answer.

A prevailed.

It was too indefinite.

To authorize a decree for specific performance, the contract, specific performance of which is sought, must so far describe the premises claimed, as that the court may be able to ascertain what they are. Maud v. Maud, 33 O.S. 147, 148; citing, Fry "Specific Performance," 157.

(37)

Brown, after residing in Cleveland, Ohio, for many years removed to California and made it his permanent home. Brown died intestate, leaving two married daughters his heirs at law, who resided in Florida. Brown owned an office building in Cleveland. Is the descent of the property governed by the laws of Ohio, Florida or California?

Ohio.

It is a well settled principle of public law, that the acquisition, of real property, whether by descent or by devise, is governed by the lex rei sitae. If the party claims by inheritance, he can look alone to the law of descent at the place where the property is situate, for his muniment of title. Jones v. Robinson, 17 O.S. 171, 179, 180.

(38)

(a) A conveyance was made to A and B husband and wife. The grant was as follows: "To A and B jointly, their heirs and assigns and to the survivors of them, his or her separate heirs and assigns." A the husband died leaving heirs at law. What estate has B the wife in said premises?

(b) Is the expectation of an heir presumptive a vested right? Can it be transferred or released?

(a) She has an estate in fee.

A conveyance to A and B, and their heirs, and to the survivor of them, and to the heirs of such survivor, vests in the survivor an estate in fee. Lewis v. Baldwin, 11 O. 352. He holds title, not upon the principle of survivorship, as an incident to a joint tenancy, but as grantee in fee, as survivor, by the operative words of the deed. Supra, p. 354.

(b) No.

No.

There is no principle better settled than that the expectation of an heir presumptive is not a vested right, but a mere possibility. It is not an estate in property, and can neither be transferred or released. Gilpin v. Williams, 25 O. S. 283, 300.

(39)

W executed his written lease of premises to B for one year. B paid one monthly rent installment and abandoned the premises and refused to pay the rent. W sought to hold B for the remaining eleven months. The evidence showed that B delivered the key to the premises to W. W advertised for a new tenant and rented the premises to others at the best available rent, which was lower than the original rent.

Did such action on the part of W constitute a surrender of the lease or his rights against B?

No.

An acceptance by the landlord of the key to the premises, his advertising for a new tenant and renting the premises to another upon its vacation by the old tenant, under the facts stated, are not sufficient to constitute a surrender. Bumiller v. Walker, 95 O.S. 344.

Suretyship

(Numbers in parenthesis refer to answers following.)

I. CREATION AND NATURE OF RELATION. (4, 31a, 32)

Principal and Surety, 4, 4-2.

30 O.S. 389; 65 O.S. 138; 66 O.S. 143; 107 O.S. 421; 15 L.R. 580.

II. DISTINGUISHED FROM OTHER CONTRACTS INCLUDING GUARANTY. (7, 26)

Guaranty, 1 et seq; Principal and Surety, 5.

36 O.S. 331; 45 O.S. 239; 77 O.S. 311; 91 O.S. 35; 17 N.P. (N.S.) 561.

III. CAPACITY AND QUALIFICATION OF PARTIES. (31c)

Principal and Surety, 6, 6-2.

G.C.§§ 2826, 10219; 31 O.S. 72; 39 O.S. 516.

IV. EXECUTION AND REQUISITES OF THE INSTRUMENT. (4)

Principal and Surety, 8, 8-2.

G.C.§ 5; 17 O. 128; 12 O.S. 219; 28 O.S. 383; 37 O.S. 484.

V. EFFECT OF ILLEGALITY, FRAUD, MISREPRESENTATION OR CONCEALMENT. (5, 23, 33)

Principal and Surety, 9 to 11.

3 O.S. 302; 33 O.S. 19; 34 O.S. 411; 40 O.S. 409; 50 O.S. 256; 76 O.S. 253; 22 C.C.(N.S.) 401.

VI. LIABILITY OF SURETY.

A. General Rules of Construction. (31b, 32)

Principal and Surety, 14.

39 O.S. 234; 84 O.S. 81; 96 O.S. 404; 100 O.S. 373; 24 App. 202.

B. Extent of Liability, Joint and Several Liability. (32, 34, 38)

Principal and Surety, 15 to 15-2.

3 O. 41; 12 O.S. 577; 39 O.S. 635; 65 O.S. 486; 111 O.S. 532; 3 O.F.D. 571.

C. Term or Period Covered. (12, 24, 36)

Principal and Surety, 16.

42 O.S. 549; 46 O.S. 20; 51 O.S. 226; 90 O.S. 392; 18 D. 834.

D. Effect of Judgment Against Principal. (14, 37)

Judgment, 148; Principal and Surety, 17.

25 O.S. 89; 46 O.S. 62; 12 App. 367; 18 App. 332.

[*References are to Bates' Compact Ohio Digest.*]

VII. DISCHARGE OF SURETY.

A. Change in Obligation of Principal. (1)

Principal and Surety, 19, 20.

107 O.S. 51; 4 App. 477; 30 O.C.A. 321; 11 C.C.(N.S.) 426.

B. Alteration of Negotiable Instrument or Other Instrument. (6)

Bills and Notes, 189; Principal and Surety, 21.

G.C.§§ 5, 8224, 8229, 8230; 54 O.S. 273; 81 O.S. 348.

C. Change of Parties to Obligation.

Principal and Surety, 22.

89 O.S. 240; 10 N.P.(N.S.) 230; 10 O.F.D. 69.

D. Extension of Time. (3)

Principal and Surety, 23 to 33.

G.C.§ 8224; 5 O. 273; 81 O.S. 348; 13 C.C.(N.S.) 357.

E. Release or Loss of Other Securities. (30, 34a)

Principal and Surety, 35, 36.

W. 477; 17 O. 292; 40 O.S. 446; 87 O.S. 377; 15 N.P.(N.S.) 460.

F. Release of Co-surety.

Principal and Surety, 37.

G.C.§ 8084; 14 O.S. 372; 20 O.S. 337; 36 O.S. 491; 51 O.S. 462.

G. Negligence of Creditor.

Principal and Surety, 38.

13 O. 84; 21 O.S. 86, 93; 49 O.S. 247.

H. Failure to Give Notice to Surety of Default.

Principal and Surety, 39.

21 O.S. 86; 40 O.S. 409; 86 O.S. 267; 14 C.C.(N.S.) 59.

I. Neglect to Proceed Against Principal; Notice by Surety.

Principal and Surety, 40 to 43.

G.C.§ 12191; 38 O.S. 430; 44 O.S. 430; 77 O.S. 270; 7 D. 292.

J. Payment or Other Satisfaction by Surety.

Principal and Surety, 45.

G.C.§ 12194; 30 O.C.A. 209; 4 B. 23.

VIII. REMEDIES OF CREDITORS.

A. Defenses by Surety. (9, 12, 15, 38, 40)

Principal and Surety, 46, 47.

W. 741; 5 O.S. 256; 28 O.S. 516; 114 O.S. 24; 118 O.S. 414.

B. Set-off or Counterclaim of Principal. (28)

Principal and Surety, 48.

22 O.S. 297; 49 O.S. 421; 12 O.F.D. 543.

C. Recourse to Indemnity to Surety.

Principal and Surety, 49.

6 O. 80; 8 O.S. 1; 3 O.F.D. 473.

D. Parties, Evidence, Judgment. (9, 35)

Principal and Surety, 52 to 53-1.

G.C.§§ 10856, 11242, 12108; 116 O.S. 576; 28 N.P.(N.S.) 145.

IX. RIGHTS AND REMEDIES OF SURETY.

A. As to Creditor. (3, 28, 34)

Principal and Surety, 54 to 56.

G.C.§§ 10856, 11713, 12190 to 12193; 16 O. 27; 24 O.S. 114; 29 O.S. 663; 65 O.S. 40.

B. As to Principal. (11, 18, 19, 34b)

Principal and Surety, 58 to 72.

G.C.§§ 12194, 12206 to 12208; 5 O. 444; 3 O.S. 129; 4 O.S. 600; 48 O.S. 75; 62 O.S. 589; 93 O.S. 362; 18 App. 426.

C. As to Co-surety, Contribution, Subrogation. (2, 10, 13, 17, 20, 23, 27, 29)

Principal and Surety, 74 to 87.

13 O.S. 514; 24 O.S. 504; 31 O.S. 406; 41 O.S. 591; 60 O.S. 57; 88 O.S. 216; 1 App. 331; 25 App. 476.

X. GUARANTY. (8, 22, 25, 39)

Guaranty, 1 et seq.

G.C.§ 8225; 12 O.S. 273; 19 O.S. 549; 29 O.S. 625; 40 O.S. 409; 83 O.S. 50; 86 O.S. 43; 89 O.S. 240; 119 O.S. 75; 23 App. 360.

Definitions

SURETYSHIP.—An undertaking to answer for the debt, default, or miscarriage of another, by which the surety becomes bound as the principal or original debtor is bound. It differs from guaranty in this, that suretyship is a primary obligation to see that the debt is paid, while guaranty is a collateral undertaking, essentially in the alternative, to pay the debt if the debtor does not pay it. Bouvier's Law Dictionary, Baldwin's Revision.

GUARANTY.—An undertaking to answer for another's liability, and collateral thereto. A collateral undertaking to pay the debt of another in case he does not pay it. It is distinguished from suretyship in being a secondary, while that is a primary, obligation; or, as sometimes defined, guaranty is an undertaking that the debtor shall pay; suretyship, that the debt shall be paid. Bouvier's Law Dictionary, Baldwin's Revision.

RELEASE OF SURETY ON NEGOTIABLE INSTRUMENT.—Sureties on negotiable instruments, who are primarily liable thereon, can not be otherwise relieved from responsibility for their payment than as provided by G.C.§ 8224. The rule of the common law that any agreement between the holder of a promissory note and the principal, which varies essentially the terms of the contract by which a surety is bound without the consent of such surety will work his release from liability, is no longer in force as to one who has signed on the face of the instrument, such rule having been in effect abrogated by G.C.§ 8224. Richards v. Banks, 81 O.S. 348.

EXONERATION.—A surety may maintain an action against his principal to compel him to discharge the debt or liability for which the surety is bound, after it becomes due. Throckmorton's General Code of Ohio, § 12206.

ACTION FOR INDEMNITY BEFORE DEBT DUE.—A surety may maintain an action against his principal to obtain indemnity against the debt or liability for which he is bound, before it is due, whenever any of the grounds exist upon which an order may be made for arrest of a debtor, or for an attachment. Throckmorton's General Code of Ohio, § 12207.

OHIO STATE BAR EXAMINATIONS

QUESTIONS WITH ANSWERS

[*Arranged Chronologically.*]

(1)

A, as payee, commenced action against B and C on a promissory note bearing interest at six per cent per annum. C filed an answer in which he averred that he is surety and further said that A and B, without his knowledge and consent, at the time of the delivery of the note, executed a separate instrument in writing in which B agreed to pay interest to A at eight per cent per annum. A demurred to the answer.

(a) Should the demurrer have been sustained or overruled?

(b) Give reason for answer.

(a) **The demurrer should have been sustained.**

(b) **G. C. § 8229 provides that when a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized, or assented to the alteration and subsequent indorsers.**

G. C. § 8230 provides that any alteration is a material alteration which changes:

1. **The date;**
2. **The sum payable either for principal or interest;**
3. **The time or place of payment;**
4. **The number or the relations of the parties;**
5. **The medium or currency in which payment is to be made; or which adds a place of payment when no place is specified; or any other change or addition which alters the effect of the instrument in any respect.**

"An alteration which changes the rate of interest is material." Harsh v. Klepper, 28 O. S. 200.

But, to discharge a surety from liability, because of a variation in the contract without his consent, it is indispensable that the variation be in the terms of the contract by which the surety is bound. He will not be discharged by an independent contract between the principal parties, though it may be contemporaneous and relate to the same subject without varying the terms of the contract of the surety. Stuts, Admr. v. Strayer, Admr., 60 O. S. 384, 54 N. E. 368.

(2)

(a) What is meant by the right of subrogation as applied to sureties?

(b) Is an action for contribution among sureties appealable from the court of common pleas to the court of appeals?

(a) Subrogation as applied to co-sureties means that no one of several sureties for the same debt is entitled to any advantage over his co-sureties in the application of the property of the principal for their indemnity, and the principal has not the right to apply his assets to the security of one in preference to another. Thus if the principal has executed a mortgage to one co-surety, or deposited collateral within or in any other way secured him out of his own property, and another co-surety pays the debt, he is entitled to subrogation to the benefit of such security as indemnity against the common burden. "If the indemnity comes from a third person, as where the wife of the principal executes an indemnity mortgage on her separate property to one surety, the rule does not apply, and such indemnity need not be shared with the other sureties." Stearns on Suretyship, § 253. Leggett v. McClelland, 39 O. S. 624.

Subrogation as it is commonly used means the substitution of another person in the place of the creditor to whose rights he succeeds in relation to the debt. That change which puts another person in the place of the creditor and which makes the right, the mortgage or the security which the creditor has passed to the person, who is subrogated to him,—that is to say, who enters into his right. Bouvier's Law Dictionary, Baldwin's Revision.

(b) Yes.

The court of appeals shall have original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition and procedendo, and appellate jurisdiction in the trial of chancery cases. Ohio Constitution, Art. IV, § 6.

"An action against co-sureties for contribution is not one in which there is a right to trial by jury, and is therefore appealable." Steele v. Gongiver, 1 App. 331, 18 C. C. (N. S.) 470 approving McCroy v. Parks, 18 O. S. 1.

(3)

(a) Where parties execute a joint and several promissory note, all signing on the face thereof, one being in fact a surety, and the holder of the note, with knowledge of this fact at the maturity of the note extends the time of payment for a valuable consideration and without the consent of the surety, is the surety discharged from liability on the note?

(b) As to the foregoing question, what was the rule at common law?

(a) No.

One who signs a promissory note on the face thereof, and, who in that way becomes a surety for the principal maker, is by force of G.C.§ 8296 primarily liable for the payment of such note.

G. C. § 8224, relating to the discharge of negotiable instruments, provides in what manner and for what cause, such intruments may be discharged, and by force of the rule expressio unius est exclusio alterius, sureties upon such instruments who are primarily liable thereon, cannot be otherwise relieved from responsibility for their payment.

G. C. §§ 8229 and 8230, relating to the alteration of instruments, apply to the physical alteration of the instrument itself, but do not apply to the contract between a holder and the principal maker for an extension of time of payment of the instrument. Richards v. Market Exchange Bank, 81 O. S. 348, 90 N. E. 1,000.

(b) The rule of the common law that any agreement between the holder of a promissory note and the principal, which varies essentially the terms of the contract by which a surety is bound, without the consent of such surety will work his release from liability, is no longer in force as to one who has signed on the face of the instrument, such rule having been in effect abrogated by G. C. § 8224." Richards v. Market Exchange Bank, 81 O. S. 348, 90 N. E. 1,000.

(4)

(a) Does the contract of suretyship ever arise by implication?

(b) If so, give example.

(c) What is meant by certification of surety?

(d) What is the effect of certification?

(a) No.

No one incurs a liability to pay a debt or perform a duty for another unless he expressly agrees to be so bound. The law does not create relations of this character by mere implication. Suretyship arises only in contract, and such a contract to be binding must be entered into for a consideration, must be duly executed between parties competent to contract, and without duress or fraud and must be in writing. Stearns on Suretyship, § 2.

Involuntary suretyship resulting from operation of law, is not an obligation to pay the debt of another by implication or by the law, but is merely extending the privileges of suretyship to parties already bound. Stearns on Suretyship, § 23.

"No action shall be brought whereby to charge the defendant, upon a special promise, to answer for the debt, default or miscarriage of another person, unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and signed by the party

to be charged therewith, or some other person thereunto by him or her lawfully authorized." G. C. § 8621.

(b) Answered in (a).

(c) "When a judgment is rendered in a court of record of this state, upon an instrument of writing in which two or more persons are jointly or severally bound, and it is made to appear to the court, by parol or other testimony, that one or more of the persons so bound, signed it as surety or bail for his or their co-defendant, the clerk, in recording the judgment thereon, must certify which of the defendants is the principal debtor, and which the surety or bail.

He shall issue execution on such judgment, commanding the officer to cause the money to be made of the goods, chattels, lands and tenements of the principal debtor, or, for want of sufficient property of his to make it, that he cause it to be made of the goods, chattels, lands and tenements, of the surety or bail. The property, personal and real, of the principal debtor, within the jurisdiction of the court, shall be exhausted before any of property of surety or bail is taken in execution." G. C. § 11713.

(d) The effect of certification is to let the property of the principal debtor be subjected to exhaustion first, before turning to the surety's assets. Wilkins v. Bank, 31 O. S. 565; Gatch v. Simpkins, 25 O. S. 89.

(5)

(a) A principal produced a surety upon his promissory note by representing to him that the forged signatures of preceeding co-sureties are genuine. As between the holder in due course and the defrauded surety, who should prevail?

(b) Give reason for answer.

(a) The holder in due course should prevail.

(b) Where a fraud is practiced by a principal debtor in procuring a surety to sign, as by first forging the names of others as co-sureties without the knowledge of the creditor, the obligation of the surety is valid and binding (for it was incumbent on the surety to ascertain if his supposed co-sureties had become legally bound.

A surety in signing his name to a promissory note below, or after the names of other persons have been placed on the note as co-sureties, although he does not thereby warrant, does, in effect affirm the genuineness of the previous signatures, and cannot avoid his liability to the payee, by showing that they had been forced to the note by the principal, but of which the creditor had no notice.

Where one of two innocent parties must suffer for the fraud of a third person, he who first trusted such third person, and placed in his hands the means which enabled him to commit the wrong, must bear the loss. John Selser Exr. v. Evan Brock, 3 O. S. 302.

Here the position of the holder in due course is even stronger than the creditor's in the above case, since it is one of the essential elements for one to be a holder in due course that he take the note without notice of any equities existing between prior parties.

(6)

(a) A surety signs a complete promissory note payable one year after date containing no stipulation as to interest. Without the knowledge of either the surety or the payee, the maker before delivery adds to the note the words "with interest at eight per cent from date."

Can the surety be held on this note?

(b) Give reason for answer.

(a) No.

(b) "Where a complete note, payable at a future day and containing no stipulation as to interest, is altered by the principal maker without the knowledge of his surety, before its delivery by the addition of the words "with ten per cent interest from date:" Held—that such alteration is material and makes the note void as against the surety, although the same is made without the knowledge of the payee. Jones v. Bangs, 40 O. S. 139. See 32 Cyc. 185.

In the above case, the court says: "the alteration consisted of words added at the end of the note. In what respect was the surety negligent in not anticipating and preventing this crime? He might, it is true, have drawn an elongated scroll from the end of the note before parting with it. If this was his duty, it was likewise his duty to have excluded the possibility of fraudulent alteration on any part of the space within the four corners. A construction of the rule which exacts such suspicious care, and requires the surety to regard his principal as a rogue, is untenable and wholly unsuited to the practical business methods of our people."

(7)

Define what is meant by the contract of Guaranty, Warranty, and Suretyship.

A GUARANTY is an undertaking that another person will pay a debt or perform a duty; the principal being primarily liable for such payment or performance. Childs on Suretyship, p. 2.

The difference between a contract of guaranty and one of suretyship should be distinguished. A surety undertakes to pay the debt of another. A guarantor promises to pay if the principal debtor does not, or cannot. A surety joins in the contract of the principal, and becomes an original party with the principal. The guarantor does not join in the contract of his principal but engages in an independent

undertaking. A surety promises to do the same thing which the principal undertakes; the guarantor promises that the principal will perform his agreement and if he does not, then he, the guarantor, will do it for him. Stearns on Suretyship, p. 5.

A WARRANTY is a contract by which the warrantor covenants or undertakes to insure that the thing which is the subject of the contract is or is not as there mentioned; as, that a horse is sound; that he is not five years old. Bouvier's Law Dictionary, Baldwin's Revision.

A GUARANTY relates to persons, to the future, is a collateral contract, and must be evidenced in writing to be enforceable. A warranty relates to things, to the present or past, is a direct contract and may be oral. Childs on Suretyship, p. 13.

SURETYSHIP is defined by statute as being a special contract whereby one agrees to answer for the debt, default or miscarriage of another.

Suretyship is the legal relationship which arises when one party assumes with another the liability for the debt, default or miscarriage of the latter; the liability of both beginning at the same time. Childs on Suretyship.

(8)

A and B went into a clothing store together where B purchased a suit of clothes. The proprietor not knowing B but being acquainted with A asked A if B was all right and A said "Sell him whatever he wants and if he fails to pay the bill, I will." B failed to pay his bill and the proprietor sued A to recover the amount.

Could he recover? Give reasons for answer.

No. The proprietor cannot recover. The statute of this state G. C. § 8621 requires "that upon any special promise to answer for the debt, default or miscarriage of another, the agreement, or some memorandum of it, shall be in writing, and signed by the party to be charged therewith, or by some other person, thereunto by him or her duly authorized." A verbal agreement, therefore, to answer for the debt, default or miscarriage of another, comes within the statute and is void.

Swan's Treatise gives the following illustration, "If B should ask you to sell goods to A, and promise that A would pay for them, or promise that he, B, would pay for them if A did not, and you should sell the goods to A, this promise of B would be void, for the reason that it is a promise to pay another's debt, and of course, should be in writing." Swan's Treatise, p. 551.

(9)

B, C and D were sureties on the official bond of A who defaulted. B was insolvent and C left the state of Ohio.

The city sued D alone on the bond. D raised the question that the other sureties should also have been made parties defendant.

Was his contention correct? Give reasons for answer.

No. The city could sue D alone. "In determining the amount which each co-surety should contribute, those who are insolvent, will be excluded, and the burden divided among those who are solvent." Stearns on Suretyship, p. 490.

If some of the sureties are absent from the jurisdiction, it does not constitute a bar to an action against the others, and those absent will be excluded, and the entire burden distributed among the ones remaining.Stearns, p. 491.

(10)

A signed a promissory note for B as surety with the understanding that B was to obtain another surety thereon, and R with knowledge that A signed with such understanding afterward signed the note as surety, but before signing and without the knowledge of A demanded that B indemnify him for so doing. B did so by assigning over to him certain stock of good value. B defaulted payment on the note and judgment was obtained against A and R. A learning that R was indemnified, raised the question by an action at law that he was entitled to share in such indemnity.

Did A prevail? Give reasons.

A should prevail.

A surety deriving indemnity from the property of the principal obliger is charged with respect to it as trustee for his co-sureties. Surety Company v. Boyle, 65 O. S. 486, 63 N. E. 73. Carpenter v. Kelly, 9 O. 106; Niece v. Rogers, 14 C. C. 646, 7 C. D. 671.

No one of several sureties for the same debt is entitled to any advantage over his co-sureties in the application of the property of the principal for their indemnity, and the principal has not the right to apply his assets to the security of one in preference to another. Stearns on Suretyship, p. 491.

(11)

A became surety for B on a promissory note for $1000 payable ninety days after date. Sixty days after A signed the note B commenced to dispose of his real estate by making deeds of transfer and advertising he was about to close out his business at public auction as he was compelled to go away for the benefit of his health.

State under these circumstances whether or not A could do anything to protect himself from liability before the note became due. Give reason for your answer.

Yes, A can protect himself by virtue of G. C. § 12207 which provides, "A surety may maintain an action against his principal to obtain indemnity against the debt, or liability for which he is bound, before it is due, whenever any of the grounds exist upon which an order may be made for arrest of a debtor, or for an attachment."

In order to show that there was a ground for attachment thus bringing the case within the purview of this section, let me quote from G. C. § 11819—"In a civil action for the recovery of money, at or after its commencement, the plaintiff may have an attachment against the property of the defendant upon any one of the grounds herein stated. (Subd. 7). "Is about to convert his property in whole, or part, into money, for the purpose of placing it beyond the reach of his creditors; (Subd. 9). Has assigned, removed, disposed of, or is about to dispose of, his property, in whole, or part, with the intent to defraud, his creditors."

(12)

A and B became sureties on the official bond of C for county treasurer, but the election of C was contested and after five months of litigation it was held that his election was invalid and he was not entitled to the position.

C was sued on his official bond, together with A and B, for malfeasance in office resulting in loss to the county. A and B set up as a defense against liability on their part that C not having been elected to said office, the giving of such bond was null and void and no recovery should be had against them as sureties.

Was this a good defense? Give reason for your answer.

This is not a valid defense. A county officer, though de facto, is regarded as an officer by the courts and his acts will be recognized, (M. A. L., Vol. XIII, p. 66). Since he is recognized as an officer, so are his sureties recognized as sureties and are held to their bond, unless they avail themselves of G. C. § 12195 which provides: "A surety of any county officer, except a commissioner, may notify the county commissioners by giving at least five days' written notice that he is unwilling to continue as surety for such officer, and will at a time to be then named, make application to them to be released from further liability upon his bond. He also shall give at least three days' written notice to each of such officers at the time and place at which his application will be made." G. C. § 12195. 32 Cyc. 70 (e).

Where a county treasurer-elect, failed to execute his official bond and take oath of office on or before the first day of his term, and the office, by virtue of the provision of the statute (2 S. and C. 1479), (Section 15), thereby, became vacant; but four days thereafter, having entered upon the duties of the office, he gave the necessary bond as treas-

urer of the county, and continued thereafter to act as such treasurer, with the assent of the commissioners of the county,—Held, that in an action against him and his sureties upon the bond, the defendants were estopped from denying that he was the treasurer-elect at the date of the bond, or from setting up the fact of such vacancy as a defense to the action. John C. Kelley et al. v. State of Ohio, for the use of the Commissioners of Brown County. 25 O. S. 567.

(13)

B borrows $1000 from C, giving as sureties D, E, and F. C permits note to run until recovery is barred by lapse of time. Thereafter he demands payment of the note from D who with full knowledge of the facts, makes payment. Can D enforce contribution from his co-sureties and if not, could he recover from B, the principal debtor?

D cannot force contribution from his co-sureties, nor can he enforce exoneration from B, the principal debtor.

If the creditor permits the Statute of limitations to run against the debt, the obligation of the debtor to pay it, is no longer enforceable, and the sureties thereon are discharged. If a surety through negligence or mistake, pays the note, he simply volunteers the payment to the creditor and cannot get contribution from the other sureties on the note, nor exoneration from the debtor himself.

(14)

B is surety on the bond of X, administrator of estate of Y. X files final account, to which exceptions are filed. On hearing it is decided that X owes the estate $10,000, which he fails to pay.

B was not a party to the proceedings in the probate court and was entirely without knowledge of the default until brought into court to answer suit against him as surety.

(a) To what extent is this judgment binding on the surety?

(b) What three different rules prevail in the United States as to the finality of the original judgment?

(a) State v. Jennings 14 O. S. 73 lays down the Ohio rule that judgment against the principal upon an official bond is prima facie evidence against the sureties.

The distinction was taken—"that where the sureties have notice of the suit, and may or do make defense, the judgment is conclusive against them. Where such notice is not given, the judgment against the principal is prima facie only. The decisions establish, that the record of such a judgment, when the sureties have no notice is prima facie evidence only, and while in the absence of other evidence, it will authorize a recovery against them, they have the right, not

merely to attack the judgment, for fraud or collusion, but to open up and inquire into the merits. Supra at p. 75, 76. See also "Todd v. Lewis," 2 Handy 280 at 281, citing State v. Colerick, 3 O. 487; 40 L. R. A. (N. S.) 715.

(b) The three different rules which prevail in the United States as to finality of the original judgment are:

1. The rule that the judgment against one who is primarily liable is conclusive against the surety, even though he is not present. Stearns on Suretyship, 305.

2. The rule that the judgment against one who is primarily liable is prima facie evidence against the surety, who is not present. Stearns on Suretyship, 302.

3. The rule that the judgment against one who is primarily liable, is no evidence at all against the surety who is not present. Stearns on Suretyship, 300.

(15)

The facts are again presented.

The shortage of X as executor was occasioned by his appropriating to his own use more than 10 years before suit was brought against the surety, $5000 of the assets of the estate, but the defalcation was so artfully concealed that it was not discovered until two years before suit was brought on the bond.

Surety pleads statute of limitation of Ohio which provides that suit on official bond must be brought within 10 years from the time cause of action accrues.

What judgment is called for? Why?

Judgment against surety.

The statute of limitations starts to run from the date of discovery of the defalcation and not from the time that the actual default was made. Since this action was brought within 10 years from the date of discovery of the default the surety cannot plead the statute of limitations and is therefore liable.

If the action be for fraud, the statute of limitations shall not run until four years after the tort is discovered. G. C. § 11224. In other words the action accrues on the date of the discovery of the fraud. This being true, the action cannot be barred against the surety for ten years thereafter, since G. C. § 11226 provides that; "An action on the official bond, or undertaking of an officer, assignee, trustee, executor, administrator, or guardian, or on a bond or undertaking given in pursuance of statute, shall be brought within ten years after the cause thereof accrued. See Burton v. Grief, 11 App. 102, 105.

(16)

The dwelling house of Brown is destroyed by fire communicated to the building by the wanton negligence of a

railroad company. Owner's loss is $5000 with insurance of $3000.

(a) Is Brown obliged to first sue the insurance company (it refusing to pay loss)?

(b) If so, can he maintain an action against railroad company for balance of his loss?

(c) Does the insurance company have a cause of action against railroad company for amount of loss to owner?

(a) No, he has his election to sue either the railroad company or the insurance company, but he could not recover the full amount from both, since he is limited in his recovery to the amount of his loss.

(b) Yes, he may maintain an action to recover the difference between what he has recovered from the one company and his loss, but he is limited to indemnity for his loss because good morals and important considerations of public policy forbid that conflagration should be made profitable. Lake Erie and Western R. R. Company v. Falk and Phoenix Insurance Company, 62 O. S. 297 at p. 303, 56 N. E. 1020.

(c) Yes, but they would be limited in their recovery to the amount that they were to pay Brown. The reason for this is equitable subrogation. If insured property is destroyed by fire through the fault or negligence of another than the insured, the insurer upon payment of the loss, will be subrogated to the right of the insured to the extent of the indemnity paid. The rights of the insurance company are precisely those of the owner against the wrongdoer. Oil Company v. Insurance Co., 15 C. C. 355, 8 C. D. 145. L. E. and W. R. R. Co. v. Falk, 62 O. S. 297 at p. 306, 55 N. E. 1020.

(17)

B, C and D became sureties on a note to A as principal to X payee, for the sum of $5,000. X refused to consummate the transaction unless an additional surety was procured. Thereupon A secured E to sign, depositing with him $5,000 in municipal bonds to indemnify him from loss by reason of his suretyship.

A defaulted, and X brought suit against four sureties. Judgment being had, B, C, D, and E each paid one-fourth of the whole judgment. B, C, and D learning of the indemnification of E, each brought suit against E to recover one-fourth of the value of the bonds.

What judgment will the law warrant, and why?

B, C and D should get judgment against E for indemnity to the extent of one-fourth each of the security held by E.

Where, of two co-sureties, the one who signed last did so only on condition of receiving indemnity, of which the first signer had no knowledge, the indemnity nevertheless

enures equally to both. Niece v. Rogers, 14 C. C. 646, 7 C. D. 671.

A surety receiving securities or indemnity holds them as trustee for all the sureties. Carpenter v. Kelley, 9 O. 106; Butler v. Birkley, 13 O. S. 514; Surety Co. v. Boyle, 65 O. S. 486, 63 N. E. 73.

No one of several sureties for the same debt is entitled to any advantage over his co-sureties in the application of the property of the principal for their indemnity and the principal has not the right to apply his assets to the security of one in preference to another.

If the principal has deposited collateral with one, or in any way secured him out of his own property and another co-surety pays the debt, he is entitled to subrogation to the benefit of such security as indemnity against the common burden. Stearns on Suretyship, p. 453.

(18)

A client of yours comes into your office and informs you that he is bound as a surety on a written instrument, (his liability is secondary) that a right of action has accrued thereon, and wants to know if he can require his creditor to forthwith commence action on such instrument, and if so what kind of notice would you give, verbal or written? Please write such notice as you would give.

WRITTEN. "A person bound as surety in a written instrument for the payment of money or other valuable thing, if a right of action accrued thereon, may require his creditor, by notice in writing, to commence an action on such instrument forthwith, against the principal debtor. Unless the creditor commences such action within a reasonable time thereafter, and proceeds with due diligence, in the ordinary course of law, to recover judgment against principal debtor for the money or other valuable thing due thereby, and to make by execution the amount thereof, the creditor or the assignee of such instrument, so failing to comply with requisition of such surety, thereby shall forfeit the right which he otherwise would have to demand and receive of him the amount due thereon. G. C. § 12191.

(Form of Notice)

To.....:

You are hereby, required, forthwith, to commence an action against (the name of the principal) on a certain (Here describe the instrument), and whereon I am surety.

(Date) ..... (Signed).....

No. 258a—Swan's Treatise, p. 566 (25th Ed.)

(19)

May or may not a surety maintain an action against his principal to compel him to discharge the liability for which he is bound after it becomes due, if so, why?

Yes, a surety may maintain an action against his principal to compel him to discharge the debt or liability for which the surety is bound, after it becomes due. G. C. § 12206.

This is termed EXONERATION, and was a right in equity that existed before the code.

A surety's suit to compel the principal to pay is an equity case and exists independently of and prior to the statute. Barbour v. Bank, 45 O. S. 133, 12 N. E. 5; Horst v. Daugue, 34 O. S. 371; Stump v. Rogers, 1 O. 533.

(20)

Your client informs you that he and Richard Doe are co-sureties on a note of Samuel Small, and to make Richard Doe secure and before the maturity of the note, Mr. Small gives Mr. Doe a mortgage to indemnify him. Your client having paid the note wants to know whether or not he has any rights in this mortgage of indemnity from Small to Doe. What would you advise him, and why?

The client is entitled to subrogation in this case.

A surety deriving indemnity from the property of the principal obligor is charged with respect to it as trustee for his co-sureties. Surety Co. v. Boyle, 65 O. S. 486, 63 N. E. 73.

In order to be entitled to subrogation the surety claiming subrogation must have paid the whole debt, which was the case here. Insurance Co. v. Straehle, 13 D. Repr. 846.

(21)

F informs you that he has an opportunity to sell his farm to H on which there is a mortgage, which mortgage H agrees to assume and pay, and wants to know, that if he makes a deed to H, reciting in the deed that H assumes and agrees to pay said mortgage as a part of the consideration price therein, whether or not he will be released from liability on the mortgage to the mortgagee.

What would you advise, and why?

I would advise F that he would not be released by the assumption of the mortgage debt by H.

There was no novation, and F would still be liable as a QUASI-SURETY, on the principle that one can assign his rights, but not his obligations. F is not a surety for H, and will not be released even if the obligee extends the time of payment of the mortgage for a definite period, and for a valuable consideration. University v. Manning, 65 O. S. 138 at p. 150, 61 N. E. 706; Teeters v. Lamborn, 43 O. S. 144, 1 N. E. 513. In re Roth 272 Fed. 517.

(22)

Your client makes a written subscription to a certain educational institution, agreeing to pay a certain sum of money, but before the subscription is accepted by the educational institution, it obtains in writing from Mr. Smith his guarantee of the payment of the subscription by your client. Your client being informed that Mr. Smith was released on his guarantee by the educational institution, wants to know if he is released by reason of the release of Smith.

What would you advise him, and why?

The principal debtor is in no way prejudiced by the release of a guarantor, and is therefore not released thereby.

A release of a guarantor does not release the principal, because the latter is primarily liable, and bound in the first instance. Smith was an absolute guarantor, and his liability was not that of a co-maker, but was a separate incident to the contract of subscription. 37 Cyc 501, § XIV, citing "Deming v. The Board of Trustees of the Ohio Agricultural and Mechanical College" 31 O. S. 41.

(23)

A executed and delivered to X his promissory note for $100 to pay the amount lost by A to X at gambling. The note was signed by B and C as sureties. A being unable to pay the note when it matured, B voluntarily paid it and sued C for contribution.

Can B recover? Give reasons.

No.

G.C.§ 5965 provides:

All promises, agreements, notes, bills, bonds, or other contracts, mortgages or other securities, when the whole or part of the consideration thereof is for money or other valuable thing won or lost, laid, staked, or betted, at or upon a game of any kind, or upon a horse race or cock fight, sport or pastime, or on a wager, for the repayment of money lent or advanced at the time of a game, play, bet or wager, for the purpose of being laid, betted, staked or wagered, are void and of no effect.

Hence it can be seen that the note in this case was void.

Where a surety has voluntarily paid money on a void note or obligation, he cannot maintain an action against his co-surety for contribution. Russell v. Failor, 1 O.S. 327.

(24)

The contract has been executed by principal and surety and delivered. The contract is definite and for a fixed period of time. Within that period the surety desires to terminate the suretyship. There is no stipulation or provision in the contract which provides for the termination.

(a) Can surety terminate the contract so far as it affects him?

(b) The surety gives written notice to the obligee that after a certain date (a reasonable time) he will no longer be liable. Does that relieve him from liability after that date? Why?

(a) No.

(b) No.

Before the delivery of the bond a surety may terminate his suretyship by notice to the obligee, but then, of course, as a matter of strict law the suretyship relation does not have its inception until after delivery. If the suretyship bond is for a definite time or involves the performance of a particular contract, the general rule is that in the absence of a stipulation in the bond, a surety cannot, before breach of the contract by the principal, terminate his suretyship by notice to the obligee after its execution has been completed by delivery. 21 R.C.L. 983, 984, § 32.

(25)

John Jones, in a letter of credit addressed to William Smith requests him to deliver goods to Charles Brown. Instead of doing this, Smith turns Brown over to Allen, who furnished the goods. Does the letter of Jones extend to credit granted to Allen? Give reason for answer.

No.

Where a letter of credit is addressed to a particular firm, no one else can rely on it as a guaranty. Taylor v. Wetmore, 10 O. 491.

There is no privity of contract. Supra, p. 494.

(26)

What distinction, if any, is there between Surety and Indemnitor?

There is an essential difference, in legal effect, between covenants of indemnity, strictly, that is, of indemnity against loss, and covenants to pay, or assume, or stand for, the debt, or a surety's liability thereon. A right of action accrues on those of the latter class as soon as the debt matures and is unpaid, because the liability then becomes absolute, and the failure to pay is a breach of the express terms of covenant. While those of the former class are not broken, and no right of action acrues, until the indemnitee has suffered a loss against which the covenant runs. This distinction grows out of the express terms of the contract, and is well established by authority. Henderson-Achert Litho. Co. v. John Shilito Co., 64 O.S. 236, 254, 255.

Contracts of indemnity are distinguished from those of suretyship in that in indemnity contracts, the engagement is to make good and save another from loss upon some obli-

gation which he has incurred or is about to incur to a third person, and is not as in suretyship a promise to one to whom another is answerable. 31 C.J. 420, § 6 (2).

(27)

A and B became bound as sureties for C, to D on a joint and several promissory note for $1,000 payable one year after date. On maturity date, A made a payment of $450 which was endorsed on the note by D as a partial payment, C then being insolvent.

(a) What right of action, if any, does A have against B on account of the payment of the $450?

(b) Give reason for your answer.

(a) None.

(b) The right of action for contribution among co-sureties accrues when one has paid more than his proportion of their liability. Camp v. Bostwick, 20 O.S. 337, 348; see L.R.A. 1917F, 1075n.

(28)

A and B are the makers of a joint and several note which is given to C. While A appears on the face of the note as a maker, he is in fact surety for B. The note is not paid at maturity and the holder thereof sues A. B has a valid set-off against the holder of the note. Can A plead B's set-off in the suit brought against him? Give brief reasons for answer.

Yes.

In an action on a promissory note against two defendants, both of who are "primarily liable" on the instrument, but one of whom is in fact a surety, it is competent for the surety to plead as a set-off an indebtedness existing in favor of the principal debtor against the holder of the note. Goddard v. Pollock, 10 App. 1.

(29)

Smith erects a house and the contractor furnishes bonds in the sum of $3,000 to save Smith from loss against liens. After the completion of the building Smith is compelled to pay $2,000 to lienholders. The X Surety Co. was surety on a bond in the sum of $2,000 and the Y Co. surety on a bond in the sum of $1,000. Smith makes demand on the X Co. for his loss and is paid $2,000. Has the X Co. any right of action against the Y Co., and if so, in what amount? Give brief reasons for answer.

Yes.

$666.67.

To give rise to the application of the doctrine of contribution between sureties, it is not necessary that there should be privity of contract between the parties, nor that

the liability of each should have been incurred at the same time; all that is required is, that the debt or burden should be common to the parties, and primarily that of the same person. Robinson v. Boyd, 60 O.S. 57; Realization Co. v. Bonding Co., 88 O.S. 216, 254, 256.

(30)

A sues B in the Justice Court and attaches property of B before judgment. B appeals the judgment against him to the Common Pleas Court and C acts as surety on the appeal bond. After the appeal bond has been filed, and before judgment in the Common Pleas, A releases the property held by the writ of attachment. Does A's act release C, the surety, from liability on the appeal bond?

Give brief reasons for answer.

No.

In giving an appeal bond there is no privity between the judgment creditor and the security upon the bond. Cit. Trust & Guar. Co. v. Timberlake, 15 C.C.(N.S.) 167, 23 C.D. 519; [aff. 89 O.S. 348].

(31)

(a) Can a cause of action exist against a surety, as such, unless a cause of action exists against the principal? Why?

(b) Explain the statement "Sureties are persons favored by law."

(c) AB, an infant, signed an agreement as surety. CD, the obligee, did not know of the infancy of AB. CD learned such fact and asked AB when he arrived at age to ratify the agreement. When AB arrived at age he ratified the agreement. Can AB be held liable as surety? Was the contract of suretyship void or voidable?

(a) No.

A cause of action cannot exist against a surety, as such, unless a cause of action exists against his principal. This rule results as a corollary, from the very definition of the contract of suretyship, that the obligation of the surety being accessory to the obligation of the principal debtor or obligor, it is of its essence that there should be a valid obligation of such a principal, and that the nullity of the principal obligation necessarily induces the nullity of the accessory. 21 R.C.L. 974, § 27; see State v. Kuhner & King, 107 O.S. 406, 421; citing, Russel v. Failor, 1 O.S. 327, and State v. Blake, 2 O.S. 147.

(b) Sureties are persons favored by the law. Their obligations are ordinarily assumed without pecuniary compensation, and are not to be extended by implication or construction. Their liability is, as it is put, strictissimi juris. They have a right to stand on the terms of their obligation,

and, having consented to be bound to a certain extent only, their liability must be found within the terms of that consent, strictly construed. 21 R.C.L., p. 975, § 28.

(c) Yes, the contract was voidable.

An undertaking by an infant as surety for the stay of execution is not void, but only voidable, and when ratified by him after arriving at majority, becomes a valid and enforceable contract. Harner v. Dipple, 31 O.S. 72.

(32)

(a) Can the liability of a surety be extended through equity?

(b) Can the liability of a surety be increased by implication or inference?

(c) How, if at all, can the agreement of suretyship be enlarged?

(a) No.

(b) No.

(c) Cannot be enlarged.

The rule to be applied to the undertaking of sureties is very clearly and satisfactorily settled. The Supreme Court of the United States, in the case of U. S. v. Boyd, 15 Pet. 208, thus states it: "This court held, in Miller v. Stewart, 9 Wheat. 702, that the liability of a surety is not to be extended, by implication, beyond the terms of his contract; that his undertaking is to receive a strict interpretation, and not to extend beyond the fair scope of its terms, and that the whole series of authorities proceeded on this ground." This court has been equally explicit upon the subject. In the case of Bank v. Carroll, 5 O. 214, it is said that "no principle is better settled at the present day, than that a surety cannot be further bound than by the terms of his undertaking." In the case of State v. Medary, 17 O. 565, it is thus forcibly stated: "The bond speaks for itself, and the law is that it shall so speak; and that the liability of sureties is limited to the exact letter of the bond. Sureties stand upon the words of the bond, and if the words will not make them liable nothing can. There is no construction, no equity against sureties. If the bond cannot have effect according to its exact words, the law does not authorize the court to give it effect in some other way, in order that it may prevail." McGoveney v. State, 20 O. 93, 97, 98.

(33)

A surety before entering into contract applies to the creditor or obligee for information touching the material matters. From the conversation the creditor knows or has good grounds for believing that the surety is being deceived and misled and that the surety is ignorant of facts that would materially increase the risks. The creditor does not

inform the surety as to the facts and does not fully disclose or acquaint the surety with the matters concerning which the surety is ignorant. Surety thereupon signs. Can surety, upon learning the facts, avoid the contract? Give reasons.

Yes.

It is a well settled rule of law that if a creditor induces his surety or guarantor to enter into the contract of suretyship or guaranty by any fraudulent concealment or misrepresentation of material facts that the surety or guarantor will be released. State Sav. & Trust Co. v. Grady, 20 App. 385, 389.

Whether he (the payee) is bound before accepting the undertaking of the surety voluntarily to inform him of facts within his knowledge which increase the risk of the undertaking depends on the circumstances of the case. The rule seems to be that if he knows or has good grounds for believing that the surety is being deceived or misled, or that he was induced to enter into the contract in ignorance of facts materially increasing the risk, of which he has knowledge, and he has an opportunity before accepting his undertaking to inform him of such facts, good faith and fair dealing demand that he should make such disclosures to him; and if he accepts the contract doing so, the surety may afterwards avoid it, though the failure to disclose such facts was not wilful or intentional. The test as to whether a disclosure should be voluntarily made by the creditor to one who is about to become surety for a debt is, it has been said, whether there is a contract between the debtor and the creditor to the effect that the position of the surety shall be different from that which he might expect. 21 R.C.L., p. 989, cited in 20 App. 385, 389.

(34)

(a) A creditor has a pledge for a debt, and has in addition, individual security, who is without indemnity. (a) Will creditor be compelled to exhaust pledged property first? (b) If creditor impairs the pledged security by any act of his, does he thereby discharge the surety? If so, to what extent?

(b) The principal fails to sign an obligation. The surety signs, knowing of such failure. (a) Is surety relieved from liability? (b) If surety is required to pay, can he recover from principal?

(a) (a) Yes.

(b) Yes, either altogether or for so much as has been lost, to the surety.

It is a well-settled rule in equity, that where a creditor holds property in pledge as security for debt, and has in addition individual security who is without indemnity, he will be compelled to exhaust his lien, and convert the pledged

property, before he resorts to the individual, and can only call on the individual, either to pay and be subrogated to the security, or to make up the deficiency after the pledged property is exhausted. It has been held that if a creditor, by any act of his, impair the security of those collaterally bound to him, he thereby discharges them, either altogether, or for so much as has been lost, to the security. The same principle is decided in Stump v. Rogers, 1 O. 533; Cass v. Adams, 3 O. 223; in 3 O. 260 and in the late case of the Miami Exporting Co. v. Bank, U. S. & Ruffner, W. 249; Downer v. Bank, W. 477, 480.

(b) (a) No.

(b) Yes.

Moreover, as it is obvious that the substantial interest of a surety in having the principal sign the obligation is satisfied if the principal is in any manner so bound that he is primarily liable to the obligee and is liable over to the surety in the event of a payment by the latter, the recent cases are in substantial accord in holding that if the principal is independently bound to a primary liability his failure to sign the obligation does not exonerate the surety. 21 R.C.L. 964, § 19; State v. Bowman, 10 O. 445; see also, 213 Fed. 204.

(35)

By statute in Ohio, public officials are required to exact from a contractor about to erect a public building a bond conditioned that he will pay all claims for material and labor. The board of education of an Ohio city lets a contract for the building of a school and accepts a bond which provides merely that the contractor will hold the board of education harmless from all pecuniary loss. Can a material man recover from the surety company which wrote this bond? Why?

Yes.

Under G.C.§§ 2365-1 et seq., a bond given by a compensated surety in connection with a contract for the erection of a public building, which agrees to indemnify a board of education of a municipality for loss occasioned in the erection of the school building in question, but fails to comply with the provisions of G.C.§§ 2365-3 et seq., that such a bond shall contain an additional obligation for the payment by the contractor and by all subcontractors for all labor performed or materials furnished in the construction, erection, alteration, or repair of such building, works, or improvements, is available for recovery by materialmen and subcontractors for all labor performed or materials furnished in the construction, erection, alteration or repair of such building, works or improvements, regardless of the terms and conditions written into the bond by the contracting parties. It is the general rule that when parties enter into a contract

and execute a bond required by statute, with regard to this contract they are chargeable with notice of the statutory provisions. Southern Surety Co. v. Chambers, 115 O.S. 434, 154 N.E. 786.

(36)

The Ex Products Co. employed C as cashier from Dec. 1, 1922, to June 9, 1924. On March 1, 1924, C gave bond with the R Co. as surety in the sum of $5,000. The bond provided that the Ex Products Co. should be protected against "such pecuniary loss of money, funds or other personal property as the insured shall sustain by any act of fraud or dishonesty, including forgery, theft, embezzlement, wrongful abstraction or misapplication."

From Dec. 1, 1922, to Feb. 15, 1924, Cook embezzled $4,000 concealing the facts from his employer by juggling his accounts. After the bond was given he took $4,000 from other funds of the Products Co. to cover up his previous defalcations.

Is the Surety Co. liable? Why?

No.

In the absence of retroactive provisions in a fidelity bond, there is no liability thereon for the acts of fraud or dishonesty of an employe who has misapplied funds of his employer prior to the effective date of such bond, even though after such date he commits new defalcations, the proceeds of which are used to make good defalcations existing prior to the effective date of such bond, the "pecuniary loss" of the insured being no greater by reason of the new defalcations. Royal Indem. Co. v. Products Co., 117 O.S. 278, 158 N.E. 824.

(37)

A filed suit in common pleas court against B for $250 and attached property of B's of that value. B replevined his property, putting up a bond in the sum of $250 with the F&D Co. as surety. After recovering his property, B goes through bankruptcy, and, believing that he is thus relieved of his obligation to A, fails to file an answer in the common pleas court action. A gets judgment against B by default and then sues the F&D Co. on its bond. Is the F&D Co. liable? Why?

Yes.

A surety on a bond given in the course of legal proceedings is bound by a judgment against the principal to the exclusion of all defenses which were or might have been set up by the principal, except that of fraud or mistake.

If an attachment bond is given in a suit in a state court within four months of the bankruptcy of said principal, and the claim against such principal is one that is dischargeable in bankruptcy, and is so discharged during the pendency of

the suit, and if such discharge in bankruptcy is plead and proved, the court will not permit a judgment to be entered and stayed against such principal for the purpose of establishing a liability of the surety on such attachment bond; in that event, the surety, being bound by the terms of the bond to respond only in the event of a judgment being rendered against the principal, is not liable, for the reason that the event has not happened on which the liability of the surety depends.

A surety having signed an attachment bond is charged with notice of all the proceedings thereafter in such suit that may affect the surety's liability, and if such surety does not intervene in said suit and plead and prove, or see that the principal pleads and proves, such discharge, but permits judgment to be entered, such judgment is conclusive against the surety and such surety is liable on the bond according to its terms. Hoiles v. Fid. & Deposit Co., 18 App. 332.

(38)

A is surety on a bond for X on an obligation incurred by X as a member of the partnership of X and Y. Upon default on the bond, the creditor sues A, the surety, for his loss. The partnership is a going concern owning property and X and Y each individually own property. Can the creditor recover? Give brief reasons for your answer.

No.

In a similar case it was held that the money due Olmstead brothers upon the termination of the Edwards-Evans agency was due from the firm, and until the firm assets and the assets of the members thereof were exhausted there could be no liability on the bond. Olmstead v. Albers, 26 C.C.(N.S.) 479, 480, 27 C.D. 362 aff. 19 N.P.(N.S.) 177.

(39)

B gives C his promissory note due one year after date for $1,000 payment of which is guaranteed by A. Twenty years thereafter C presents the note to A and demands payment. A pays the note. A sues B for the amount he has paid. Can he recover? Give brief reasons for answer.

No.

G.C.§ 11211 provides:

An action upon a specialty or an agreement, contract or promise in writing shall be brought within fifteen years after the cause thereof accrued.

No right against the principal existing, there was no further obligation on the note and B's payment was voluntary. See Russell v. Failor, 1 O.S. 327.

(40)

The First Savings Bank agreed to loan Jones $1,000 if he would procure Smith to sign the note as a joint maker with Jones.

Thereupon Jones and Smith signed the note, and the Bank delivered the $1,000 to Jones.

Before the maturity of the note the Bank became apprehensive about the ability of Jones and Smith to pay the note at maturity, and asked Jones to procure another signer, and thereupon he brought to the Bank one Williams, who signed his name to the note, without any agreement, statement or representation of any kind by the Bank.

The note was not paid at maturity.

What, if any, legal right to recover judgment against Williams does the Bank have?

Give reason for your answer.

None.

"Absence or failure of consideration is a matter of defense as against any person not a holder in due course * * *." G.C.§ 8133.

Upon the above facts, there was no consideration for Williams' signature to the note, and the Bank, the payee, not being a holder in due course could not bar this defense.

Torts

(Numbers in parenthesis refer to answers following.)

I. DEFENSE OF PERSON AND PROPERTY. (25)

Assault and Battery, 24; Trespass, 15.

W. 94; 27 O.S. 478; 14 C.C.(N.S.) 70; 2 D. Repr. 733.

II. ASSAULT AND BATTERY. (25)

Assault and Battery, 1 to 15.

G.C.§§ 11225, 11235; 45 O.S. 177; 21 N.P.(N.S.) 206.

III. FALSE IMPRISONMENT. (15)

False Imprisonment, 1 to 15.

50 O.S. 179; 62 O.S. 500; 97 O.S. 171; 110 O.S. 532; 22 App. 520.

IV. SEDUCTION.

Seduction, 1 to 6.

W. 103; 11 O.S. 330; 28 O.S. 625; 84 O.S. 111; 2 D. Repr. 312.

V. DEFAMATION, LIBEL AND SLANDER.

A. Words and Acts Actionable, Liability. (5, 11, 29, 36)

Libel and Slander, 1 to 28.

6 O.S. 228; 19 O.S. 430; 29 O.S. 62; 84 O.S. 628; 36 O.S. 107; 21 App. 422; 18 C.C.(N.S.) 583; 21 N.P.(N.S.) 562; 22 N.P. (N.S.) 337.

B. Privileged Communications and Malice Therein.

Libel and Slander, 29 to 44.

G.C.§§ 11343-1, 11343-2; 20 App. 243; 21 App. 454.

C. Justification and Mitigation. (30)

Libel and Slander, 45 to 53.

G.C.§§ 11342, 11343; 32 O.S. 604; 40 O.S. 148; 18 C.C.(N.S.) 549.

D. Pleadings, Evidence and Damages. (29)

Libel and Slander, 54 to 103.

G.C.§§ 11341 to 11343; 68 O.S. 95; 23 App. 44; 20 C.C. 459.

E. Slander of Property or Title.

Libel and Slander, 104 to 110.

84 O.S. 118; 8 N.P.(N.S.) 201; 11 N.P.(N.S.) 507.

VI. TRESPASS.

Trespass, 1 to 26.

54 O.S. 532; 60 O.S. 560; 61 O.S. 312; 63 O.S. 236; 90 O.S. 144; 117 O.S. 252; 20 App. 162; 20 App. 261; 27 N.P.(N.S.) 116.

[*References are to Bates' Compact Ohio Digest.*]

VII. TROVER AND CONVERSION.

Trover and Conversion, 1 et seq.

2 O.S. 203; 49 O.S. 489; 94 O.S. 189; 111 O.S. 361; 3 App. 116; 16 App. 474; 19 App. 130; 22 App. 21.

VIII. FRAUD.

Fraud, 1 to 38.

G.C.§§ 8052, 11224, 11235; 91 O.S. 268; 115 O.S. 11; 22 App. 379; 26 App. 74.

IX. NUISANCE.

A. Private Nuisance, (26)

Nuisance, 4 to 56.

5 O. 320; 37 O.S. 583; 54 O.S. 73; 102 O.S. 176; 104 O.S. 519; 114 O.S. 170; 114 O.S. 207; 17 App. 414; 25 N.P.(N.S.) 493.

B. Public Nuisance.

Nuisance, 59 to 84.

G.C.§§ 12646 to 12662; 113 O.S. 245; 113 O.S. 689; 20 App. 452; 22 App. 82; 22 App. 159; 26 N.P.(N.S.) 137; 26 N.P. (N.S.) 195.

X. NEGLIGENCE.

A. Elements of Negligence; When Duty to Use Care. (10, 12, 27c)

Negligence, 1 to 20.

72 O.S. 322; 103 O.S. 373; 117 O.S. 236; 16 App. 129; 22 App. 98; 26 App. 109; 26 L.R. 292.

B. Dangerous Substances and Other Instrumentalities. (27)

Negligence, 23 to 34.

G.C.§§ 5903-1 et seq; 60 O.S. 560; 90 O.S. 144; 114 O.S. 423; 18 App. 290; 18 N.P.(N.S.) 120; 27 L.R. 307.

C. Condition and Use of Land and Property. (37)

Negligence, 36 to 45.

42 O.S. 458; 103 O.S. 373; 112 O.S. 122; 116 O.S. 404; 116 O.S. 718; 118 O.S. 334; 23 App. 500.

D. Degree of Care Required; Liability of Principal. (7, 9, 27, 31)

Negligence, 11 to 19.

40 O.S. 637; 43 O.S. 224; 66 O.S. 276; 66 O.S. 45; 113 O.S. 591; 17 App. 221; 18 App. 177; 18 App. 290; 19 App. 94; 24 App. 457; 26 App. 359.

E. Joint and Several Liability. (21)

Negligence, 20.

7 O.S. 226; 40 O.S. 314; 100 O.S. 348; 110 O.S. 516; 17 App. 352; 20 App. 148; 21 App. 314.

F. Proximate Cause of Injury. (3, 14, 22)

Negligence, 48 to 57.

98 O.S. 42; 101 O.S. 111; 116 O.S. 448; 8 App. 272; 25 App. 186.

G. Contributory Negligence, Last Clear Chance. (6, 18, 20, 23, 24, 37)

Negligence, 61 to 83, 101, 184.

69 O.S. 45; 76 O.S. 234; 95 O.S. 305; 114 O.S. 40; 114 O.S. 493; 118 O.S. 480; 17 App. 243; 17 App. 293; 23 App. 448; 27 App. 355; 22 N.P.(N.S.) 99; 26 L.R. 99.

H. Imputed Negligence. (3, 19)

Negligence, 85 to 90.

18 O.S. 399; 30 O.S. 451; 45 O.S. 470; 54 O.S. 181; 66 O.S. 326; 18 App. 366; 21 App. 322; 21 C.C.(N.S.) 471.

I. Comparative Negligence.

Negligence, 91 to 94.

G.C.§ 6245-1; 109 O.S. 341; 114 O.S. 157; 22 App. 191.

J. Pleadings, Evidence, Presumptions, Res Ipsa Loquitur, Burden of Proof. (1, 4, 28, 34, 35)

Negligence, 96 to 201.

74 O.S. 379; 101 O.S. 62; 111 O.S. 575; 114 O.S. 178; 114 O.S. 423; 115 O.S. 262; 116 O.S. 451; 117 O.S. 252; 118 O.S. 247; 9 App. 426; 17 App. 262; 22 App. 234; 29 App. 522; 13 C.C.(N.S.) 571; 26 L.R. 345.

XI. MALPRACTICE. (38)

Attorney and Client, 53 to 58; Physicians and Surgeons, 33 to 56.

119 O.S. 422; 17 App. 258; 19 App. 416; 24 App. 136; 25 App. 328; 29 App. 278; 27 L.R. 193.

XII. MALICIOUS PROSECUTION. (15, 33)

Malicious Prosecution, 3 et seq.

27 O.S. 22; 61 O.S. 489; 74 O.S. 271; 19 App. 239; 22 App. 174.

XIII. UNFAIR COMPETITION AND INTERFERING WITH CONTRACTURAL RIGHTS. (2)

Injunction, 40, 99; Master and Servant, 178 to 187; Trade Marks and Names, 35.

17 App. 265; 18 App. 352; 19 App. 388; 21 App. 177; 23 App. 281; 23 L.R. 596; 27 L.R. 59.

XIV. TORTS OF MUNICIPALITIES.

A. Exercise of Governmental Function.

Municipal Corporations, 525 to 535.

106 O.S. 342; 106 O.S. 357; 113 O.S. 250; 19 App. 370; 24 App. 268; 26 App. 109; 27 App. 250; 28 App. 266.

B. Defects or Obstructions in Streets, Sidewalks; Sewers and Drains. (32)

Municipal Corporations, 424 to 428; 538 to 573.

G.C.§ 3714; 42 O.S. 625; 18 App. 1; 25 App. 286; 26 App. 408.

XV. ANIMALS AND DOGS. (8)

See Personal Property, VI.

XVI. STATUTE OF LIMITATIONS.

Limitations of Actions, 25 to 30, 66 to 71.

G.C.§§ 11224 to 11225, 11228, 11229; 24 App. 136.

XVII. DEATH BY WRONGFUL ACT.

Death, 10 to 89.

G.C.§§ 10770 to 10773-1; 24 App. 374; 24 App. 391.

XVIII. HOSPITALS AND CHARITABLE INSTITUTIONS.

See Agency, VIF.
Cincinnati Law Review, Jan., 1928, P. 72.

Definitions

TORT.—A private or civil wrong or injury. A wrong independent of contract. The breach of a legal duty. Bouvier's Law Dictionary, Baldwin's Revision.

CONVERSION.—An unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of the owner's rights. Bouvier's Law Dictionary, Baldwin's Revision.

NUISANCE.—Anything that unlawfully worketh hurt, inconvenience, or damage. A private nuisance is anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another. A public or common nuisance is such an inconvenience or troublesome offence as annoys the whole community in general and not merely some particular person. It produces no special injury to one more than another of the people. Bouvier's Law Dictionary, Baldwin's Revision.

NEGLIGENCE.—The omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or the doing something which a prudent and reasonable man would not do. Bouvier's Law Dictionary, Baldwin's Revision.

COMPARATIVE NEGLIGENCE.— * * * The fact that the employee may have been guilty of contributory negligence shall not bar a recovery where his contributory negligence is slight and the negligence of the employer is gross in comparison. But the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. * * * Throckmorton's General Code of Ohio, § 6245-1.

LAST CLEAR CHANCE.—If the plaintiff by his own negligence has put himself in a position of peril, and the defendant discovers his danger, or, by reason of some duty owing by him to the plaintiff, ought to discover it, and after that fails to exercise ordinary care to avoid the injury, then the defendant is liable notwithstanding this prior negligence of the plaintiff, because, having the "last clear chance," or opportunity, to prevent the accident, his negligence, and not that of the plaintiff, is regarded as the proximate cause. Bouvier's Law Dictionary, Baldwin's Revision.

CONTRIBUTORY NEGLIGENCE.—Contributory negligence has been well defined as a want of ordinary care upon the part of a person injured by the actionable negligence of another, combining and concurring with that negligence, and contributing to the injury as a proximate cause thereof, without which the injury would not have occurred. Winters v. Ry., 8 L.R. 366.

RES IPSA LOQUITUR.—A phrase often used in actions for injury by negligence where no proof of negligence is required beyond the accident itself, which is such as necessarily involves negligence. Bouvier's Law Dictionary, Baldwin's Revision.

PER SE.—Taken alone; in itself; by itself. Thus, in slander certain words are said to be actionable per se, i. e. no special damage need be proved in order to recover for the speaking them. Bouvier's Law Dictionary, Baldwin's Revision.

OHIO STATE BAR EXAMINATIONS

QUESTIONS WITH ANSWERS

[*Arranged Chronologically.*]

(1)

There is a city ordinance in Columbus, Ohio, prohibiting leaving of a motor vehicle unattended in the streets of that city for more than an hour, except in places designated for parking, and there is also an ordinance there prohibiting the leaving of horses unattended in the streets unless securely tied. Employes of the Suburban Express Co., while delivering merchandise in an automobile truck, belonging to the company, leave the truck in a street not designated for parking, while they are in a restaurant. At the same time Jones leaves his horse and wagon unattended for more than an hour, two boys climb into it and meddle with the automatic starter whereby the truck is put in motion and bumps against the wagon, frightening the horse and causing it to run away. The wagon and its contents are destroyed, and Jones brings action against the Express Company. There is a plea of contributory negligence. The proof offered by Jones tends to show that his horse had been drawing the wagon for many years and was accustomed to standing unfastened in the streets, and had never been known to become frightened or to start up of his own accord. In this situation and upon this state of the record, should this case on motion be taken from the jury? and why?

No.

The general rule in Ohio now seems to be settled that the violation of a municipal ordinance intended for the protection of the public is negligence per se. Schell v. Dubois, Admr. ,94 O. S. 93, 113 N. E. 664.

This being true, both parties were guilty of some negligence. But whether the negligence of either party could be considered as a proximate cause of the accident is a question to be determined by the jury.

Hence the rule known as the SCINTILLA rule applies. This rule briefly stated is as follows: "If there is any evidence tending to support the plaintiff's case, it is the duty of the court to submit the case to the jury. Frank v. Brewing Co., 18 D. (N. P.) 601, Aff. in 80 O. S. 724.

Therefore the present case must go to the jury.

(2)

Harvey is a manufacturer who sells goods of his own make. Madden is a rival manufacturer who buys a large amount of Harvey's goods and sells them below cost. Madden does this in order to increase his own trade at the expense of Harvey, and he also is influenced by personal illwill against Harvey. The result of this course of conduct by Madden is that Harvey loses many customers who have formerly dealt with him and some of them even break contracts previously made. All this is the natural result of Madden's conduct, as he knew. What, if any, right has Harvey against Madden, and why?

Harvey has a right of action against Madden for damages and can also have an injunction to enjoin him from continuing acts of unfair competition, procuring third persons to break contracts and interfering with the advantageous relation.

The rule of law governing unfair competition cases is broad, certain and well understood. No man should be permitted to impose his goods on the public in any way by inducing it to believe that they are the goods of someone else. Hopkins on Trade-Marks, Trade-Names, etc., 3rd Ed., p. 42. Nims on Unfair Competition, 2nd Ed., p. 15.

"Unfair Competition consists essentially in the conduct of a trade or business in such a manner that there is an express or implied representation that the goods or business of one man are the goods or business of another." Big Store Co. v. Levine, 22 N. P. (N. S.) 469, 31 D. 351.

Merely underselling a competitor is not, of course, an actionable wrong. There is no right better established under the law of business than the right of trade competition. This right operates as a justification for many acts that tend to injure a person in his business, which might otherwise be actionable. The extent to which a person may go in gaining trade for himself, or taking trade from another, has been a fruitful source of litigation, and the doctrines enunciated with reference thereto have been stated eleswhere.

While interference with a contract of employment has long been considered an actionable tort, yet the courts are divided as to the liability of one who procures or induces a breach of contract other than for personal services. The weight of authority probably supports the rule that such an action will lie for maliciously inducing the breach of a contract, other than a contract of employment, though some courts have limited the right of action to contracts for personal service. 26 R. C. L. §§ 23 and 25, p. 774.

There appears to be no direct adjudication of this point in Ohio but it is safe to say that Ohio will follow the general rule that has been laid down.

(3)

Lockwood took Robert Adams for an automobile ride. They stopped at a roadhouse and purchased and drank some moonshine whiskey in violation of the law and proceeded on their way. Lockwood drove negligently and collided with an automobile that was being negligently driven by Robert's brother, Dave Adams. The collision was the result of the concurrent negligence of the drivers of the two automobiles. Robert Adams was injured and sues Lockwood.

Judgment for whom? And why?

Robert Adams should recover.

"It is said that the negligence of a driver of an automobile cannot be imputed to his guest." Ruskamp v. Cincinnati Traction Co., 23 N. P. (N. S.) 553.

"Furthermore it has been held that a passenger is not obliged to keep telling the driver what he ought to do, for a passenger in an automobile has a right to assume that the driver knows how to operate the car, and that he is driving in a proper manner." Cleveland Ry. v. Keller, 15 App. 346.

But a passenger riding as a guest of the driver of an automobile is required to exercise ordinary care for his own safety, therefore the court may properly refuse to give a special charge which ignores the question of contributory negligence on the part of such passenger. Rohr, Admr. v. Scioto Valley Traction Co., 12 App. 275.

If Robert Adams had been in such a state of intoxication that such intoxication was a proximate cause of the injury, then he could not recover since he would then be guilty of contributory negligence. This of course is a jury issue. In the present statement of facts, there is no indication that Robert Adams was in such condition nor that it was a proximate cause of the injury.

(4)

A pathway alongside the tracks of the C. H. & D. Ry. Co. on its private right of way through a village in Ohio, had been used by the town people for several years in spite of notice forbidding such use. Brown, while walking along such pathway at a point at which, under ordinary circumstances, he would be in no danger from a passing train, was injured by a door which fell from a box car in a passing freight train. There was no evidence as to how the door became detached. Brown sues the C. H. & D. Ry. Co. in an action of tort.

Judgment for whom, and why?

The judgment should be for Brown.

The doctrine of RES IPSA LOQUITUR applies.

This maxim means that if one charged with some degree of care, by act or omission injures another, not only without fault but without active participation on the part of such other, and the agency or thing causing the injury is within the entire control or use of the injurer, then the presumption of negligence itself arises.Public Utility and Service Co. v. Grogg, 103 O. S. 301 at p. 304, 133 N. E. 481; Cincinnati Traction Co. v. Holzenkamp, 74 O. S. 379, 78 N. E. 529.

It is well settled that where a railroad company has for a long time permitted the public, including children, to travel and pass habitually over its road at a given point, without objection or hinderance, it should in the operation of its trains and management of its road, so long as it acquiesces in such use, be held to anticipate the continuance thereof, and is bound to exercise care, having due regard to such probable use and proportioned to the probable danger to persons so using its road. Harriman v. P. C. & St. Ry. Co., 45 O. S. 11, 12 N. E. 451.

Where a person is on the right of way by the express or implied consent or invitation of the railroad company as where the public has habitually passed across and along the right of way at a certain place for a long time with the company's knowledge or consent, a railroad company has reason to anticipate his presence on the track at such point and is bound to use reasonable care to avoid injuring him. 33 Cyc. 767, 768, 769.

In "Smith v. Miller," it was said that the fact that a sign fell to the sidewalk, injuring a pedestrian who was passing thereunder affords some evidence as a matter of law, that someone was negligent in not maintaining it in a safe condition. 11 C. C. (N. S.) 577, 21 C. D. 171.

(5)

Scott in Cincinnati sends Bartram in Cleveland the following telegram "Your dishonesty discovered. Shall prosecute unless you make immediate restitution." The message passes successfully through the hands of Clinton in Cincinnati and Carleton in Cleveland, employes of the Northern Telegraph Co., and is then delivered to Bartram. Bartram has not been dishonest, but Scott believes that he has.

What action, if any, has Bartram, and why?

(a) Against Scott?

(b) Against the Telegraph Co?

(a) Bartram has an action against Scott for libel.

To say of any man that he is dishonest is not actionable when spoken but to publish such in writing constitutes libel. Austin v. Culpepper, 2 Show 313, cited in Newell on Libel and Slander, 4th Ed. (1924) p. 60.

The writing of a telegram and the delivery of it to a

telegraph company for transmission constitutes a publication by the sender. Newell on Libel and Slander, 4th Ed. (1924) p. 226.

An Ohio case Steele v. Edwards, 15 C. C. 52 holds that merely mailing a postal card at a postoffice does not amount to a publication to the postal authorities or any person other than the one to whom it is addressed, of any matter written on the side thereof for the message.It is submitted, however, that the delivery to the telegraph company is not analogous, for the reason that in the case of mailing a post card, it is no part of the business of the postoffice officials to read its contents, while in the case of a telegram, the officials must repeat it before sending.

(b) Bartram has an action for libel against the Telegraph Company.

A telegraph company need not and should not accept a message which is obviously libelous; but if the message is reasonably capable of an innocent construction, or might reasonably be supposed to be a privileged communication, the telegraph company cannot refuse it on the ground that it may possibly be libelous. 37 Cyc. 1696 and 1661.

Where a telegraph company receives a libelous message through its station agent acting within the scope of his authority and transmits it to its agent at another point, there is a publication by the company and the telegraph company was held liable for transmitting a libelous message. Newell on Slander and Libel, 4th Ed. (1924) p. 226.

Where a libelous message is delivered to one operator of a telegraph company and is by him forwarded over the company's wires to the receiving operator to be by him reduced to writing and delivered to plaintiff, such forwarding constitutes a publication by the company and the fact that the message was transmitted over the wires by sound does not render the publication oral instead of written. 36 C. J., p. 1229, § 183.

(6)

Jones is operating his automobile on a public highway after dark, but fails to have a warning light on the rear thereof. Smith, operating his automobile 40 miles an hour, comes onto Jones' automobile from the rear but sees it too fate to avoid a collision. Jones sues Smith for property damage done and alleges Smith was negligent in the premises. In the pleadings and, upon proof the facts are shown to be exactly as set forth here. Smith alleges Jones contributed to the injury by violating the law requiring automobiles to carry a rear light. Who should prevail? State reasons. BE BRIEF! ! !

Smith should prevail. G. C. § 12614-3 requires that every person who operates a vehicle one hour after sunset to one hour before sunrise on a public street, or highway,

shall have attached thereto a light, the ray of which shall be visible at least 200 feet from the rear. It is the law that violation of a statute of the state constitutes negligence per se. There is also an express statute which makes it prima facie negligence to drive a motor vehicle outside of a municipality at a greater speed than thirty-five miles per hour. G. C. § 12603. From the facts stated, it is evident that the negligence of both parties contributed to cause the injury complained of. In a collision case, no recovery can be had if the plaintiff's own negligence contributed in the slightest degree to the injury. Chesrown v. Bevier, 101 O. S. 282, 128 N. E. 94.

(7)

A street car motorman is pushing a broken-down street car into the railway company's private car house which carries a sign, forbidding trespassers to enter. The motorman calls to Jones a friend to help him and Jones, not an employe of the railway company, assists in pushing the car into the car house. While so doing, Jones was injured by the negligence of an employe of the railway company. Is the company liable to Jones? State reasons. BE BRIEF!!!

Yes, Jones can recover.

In a similar case, where a passenger assisting a servant on a street railroad to push back the car which had overshot a switch, at the servant's request, and being injured by the carelessness of the driver of the passing car, is not a volunteer, nor are he and the driver of the other car fellow-servants, and the doctrine of respondeat superior applies. Railroad v. Bolton, 43 O. S. 224, 1 N. E. 333.

In another case, an employe, repairing a car, called his son of eleven years to render him necessary assistance, and the son was injured by the negligence of another railroad backing cars on a side track against the car being repaired. It was held that the latter company was liable to the son. Pennsylvania Co. v. Galligher, 40 O. S. 637.

(8)

Smith is the owner of a dog, registered and licensed according to the Ohio laws. The dog bites Jones, a peddler who is soliciting business at the Smith residence. Jones sues Smith. Smith answers, setting up the registration and licensing of the dog and pleads that he, Smith had no knowledge that the dog was vicious. At the trial, Smith offers several witnesses and proves the dog was not vicious but on the contrary, was very gentle in nature. Can Jones prevail? State reasons. BE BRIEF!!!

Jones can recover.

At common law, knowledge on the part of the owner of the vicious propensities of a dog was necessary to make him liable. The gist of the action consisted in keeping the

dog in a negligent manner with knowledge of his vicious propensities. 14 C. C. (N. S.) 511, 23 C. D. 211, 12 N. P. (N. S.) 80, 22 D. 362 citing Hayes v. Smith, 62 O. S. 161, 56 N. E. 879.

About a month after the decision of Hayes v. Smith, the legislature enacted section 5838 of the General Code in its present form for the purpose of changing the rule laid down in that case. Frerich v. Blake, 18 C. C. (N. S.) 466, 33 C. D. 163.

This section as it now stands, abolishes the common law rule that "every dog is entitled to one bite," and makes the owner or harborer of a dog liable to a person bitten by the dog, without regard to knowledge that the dog was vicious. Gries v. Zeck, 24 O. S. 329; Mehment v. Kelso, 26 C. C. (N. S.) 350; Job v. Harlem, 13 O. S. 485.

In Kleybote v. Buffon, 89 O. S. 61 at p. 66, it is said: "The statute imposes an absolute liability on the owner of the dog, and the averment and proof of scienter are unnecessary. The owner is liable regardless of his conduct in the keeping of the dog. Under the statute the conduct of his property renders him liable, and his own negligence in the matter is wholly immaterial." App. in Silverglade v. Von Rohr, 107 O. S. 75, 140 N. E. 669. Lisk v. Hora, 109 O. S. 519, 522.

(9)

Smith steals a ride on a freight train and is discovered by a railroad policeman. While the train is traveling at a high rate of speed, the policeman throws Smith from the train, severely injuring him. Can Smith recover? State reasons. BE BRIEF!!!

Yes.

Smith can recover. The railroad policeman was acting as agent for the company and within the scope of his employment, thus causing the company to become liable for the injury inflicted. This case does not fall within the ruling of New York, Chicago and St. Louis Railroad Co. v. Fiebark, 87 O. S. 254, 100 N. E. 889, which limits the liability of a railway company for acts done by the railroad police, but the present case is governed by Railroad Co. v. John Boyer, 18 C. C. 327, 10 C. D. 199.

In that case, the plaintiff got upon a freight train of the defendant railway company for the purpose of riding, and while the train was in motion and running at a high rate of speed a servant of the company demanded that he leave and upon his refusal due to the high speed of the train, he was thrown off whereby he was mangled, crushed and broken. Held, the company has a right to eject such trespasser, but he is shielded by law from wanton and unnecessary assault, and his removal should not be made in a manner which will

jeopardize his life or health. C. H. & D. Railroad v. John Boyer, 18 C. C. 327, 10 C. D. 199.

In order to hold a railroad company responsible for an injury resulting to a treaspasser upon one of its trains when there is no contractual relationship between the parties and the injury results from an order to get off the train by an employee other than the conductor or the person in charge of the train, the party injured must establish one of two propositions: Either that there was direct authority given the employee to order such person off the train, or from the employment or position occupied by such employee giving the order that a duty arises by implication of law. Whistler v. Cowan, 4 C. C. (N. S.) 625, 16 C. D. 511.

(10)

Mary Smith is crossing a public highway in a careful manner. Jones is operating his automobile while intoxicated and at a high rate of speed. Jones' automobile bears down upon Mary Smith and narrowly averts hitting her. Mary Smith manages to cross without being struck but immediately dies from fright induced by the narrow escape The administrator of Mary Smith's estate sues Jones for wrongful death. Can he recover? State reasons. BE BRIEF!!!

No.

Mary Smith cannot recover. No liability exists for acts of negligence causing mere fright or shock, unaccompanied by contemporaneous physical injury, even though subsequent illness results, where the negligent acts complained of are neither wilful nor malicious. Miller v. Railway Co., 78 O. S. 309, 85 N. E. 499. Penn Co. v. White 242 F. 437, 439.

It would seem to be a harsh rule, that a person cannot recover for a physical injury, as for instance, a rupture of the heart or of a blood vessel, or paralysis or some other functional disorder, caused by fright in consequence of the negligence of another. Whether such rule would be followed was questioned, but not decided. Obliger v. Traction Co., 3 C. C. (N. S.) 369, 13 C. D. 265.

(11)

(a) As applied to the law of torts what is meant by the term "legal malice" as distinguished from malice in fact?

(b) Name two tort actions in which malice is an essential ingredient of the cause of action, but in which the existence of legal malice is sufficient.

(a) Legal Malice or malice in law is synonimous with implied malice and it is an act done wrongfully and wilfully, without reasonable or probable cause, and not necessarily an act done from ill feeling or spite, or a desire to injure another. Bouvier's Law Dictionary, Baldwin's Revision.

Legal or implied malice is where a wrongful act is done intentionally without just cause or excuse, which may result in injury to another; it is implied from the doing of such act. Mengert v. Printing Co., 50 B. 414.

Malice in fact is synonimous with express malice, as distinguished from implied malice. Bouvier's Law Dictionary, Baldwin's Revision.

Express malice is the doing of a wrongful act from an actual feeling of hatred or ill-will toward another; it is never implied but must always be proven from the circumstances and evidence in the case. Mengert v. Printing Co., 50 B. 414.

(b) 1. Slander per se;
2. Libel.

(12)

In an action by a minor employe against his master for an injury alleged to have been sustained by the employee by reason of the alleged negligence of the master with respect to certain alleged defective machinery furnished for the use of the employee, it appeared as an undisputed fact that the employee was under the age at which under the statutory law of this state he could be legally employed in the particular work he was doing at the time of his injury. The court in its charge to the jury among other things said that they should consider the fact that the plaintiff was illegally employed as a circumstance in connection with other evidence in the case as bearing upon the question whether the plaintiff's injury was caused by the master's negligence. Was the charge of the court in this respect correct or erroneous?

Give reasons for your answer.

It was correct.

An action for negligence involves three essential elements: First, the existence of a duty owing by the defendant to the plaintiff; Second, defendant's failure to discharge that duty; Third, injury to the plaintiff proximately resulting from such failure. Concerning the first of these essential elements, the duty may be either created by statute or by the rules of the common law. By the later cases it has been declared by this court that a duty defined by statute is an absolute duty, leaving for the jury only to determine whether there has been a failure to comply with the statute, proximately resulting in injury and damage. The principle has therefore become reasonably well-established that the violation of a statute defining a duty or obligation, proximately resulting in injury and damage, constitutes negligence per se. In the case at bar, the company owed to the plaintiff, a minor under 18 years of age, the duty not to employ him. Hadfield-Penfield Steel Co. v. Sheller, 108 O. S. 106, 141 N. E. 89.

(13)

A railroad company in M..... County, Ohio, extended its tracts in and across a public road so much below the grade of the road as to necessitate the construction of a bridge over the railroad tracks for the purpose of re-uniting the highway. The railroad company constructed the bridge but thereafter refused to keep the same in repair, claiming that it was the duty of the board of county commissioners to do so, all of which the county commissioners denied. As the result of this situation the floor of the bridge to the knowledge of both the railroad company and the county commissioners became in a dangerous condition with the result that one B, a traveler on the bridge, was seriously injured without any fault on his part. In this situation discuss fully the rights and liabilities of the parties concerned, giving reasons for your conclusions.

When a railroad company so constructs its road across a highway as to necessitate a bridge over the road, the primary duty to construct and maintain the bridge rests with the railroad, and a person injured by its defective condition due to the negligence of the railroad may recover damage for such injury from the railroad. But the board of county commissioners, being charged with the duty of maintaining all bridges in the county, is secondarily charged with the duty, and is liable for injuries due to defective condition, which the commissioners knew to have existed. They should have compelled the railroad to repair or should have repaired the bridge and charged it to the railroad. If the board of county commissioners answers in damages, they can compel indemnity at the hands of the railroad which owed the principal duty to repair. Both the railroad and county are liable.

The board of county commissioners may sue and be sued, plead and be impleaded in any court of judicature, bring, maintain, and defend all suits in law or in equity involving an injury to any public, state or county road, bridge, ditch, drain or water course established by such board in its county, and for the prevention of injury thereto. The board shall be liable in its official capacity for damages received by reason of its negligence or carelessness in not keeping any such road or bridge in proper repair, and shall etc. G. C. § 2408.

By reason of G. C. § 2408 the county, in order to afford a safe way for the public, may and should make repairs if the railroad fails to do so, and charge the cost to the railroad company. Further an action in mandatory injunction may perhaps be available to county commissioners to compel the railroad company to make necessary repairs. Op. Atty. Gen., 1922, p. 1020.

(14)

(a) As applied in tort actions, what is meant by the term "proximate cause"?

(b) Two causes combine to produce an injury to an occupant of a vehicle passing over a bridge in a public road, both of which causes were in their nature proximate to the injury. One of these causes was a culpable defect in the bridge which it was the duty of the defendant to keep in repair, and the other cause was an occurrence as to which neither party was at fault. Neither cause was in itself sufficient to produce the injury, but required the concurrence of both to produce this result. In this situation, assuming that the person injured was without contributory negligence, was the defendant liable for the damages resulting from the injury. Give reasons for your answer.

(a) Proximate cause is that cause which, in a natural and continuous sequence, unbroken by any new cause, produces an event, and without which the event would not have occurred. The proximate cause is that which is nearest in the order of responsible causation. Bouvier's Law Dictionary, Baldwin's Revision.

The proximate cause of a result is that which in a natural and continued sequence contributes to produce the result without which it would not have happened.' Piqua v. Morris, 98 O. S. 42, 120 N. E. 300.

In order to make a wrongful act or omission the proximate cause of a subsequent injury, it is not necessary that the effect or probable result which occurred should have been anticipated; but it is sufficient if, in the light of all of the surrounding circumstances, such result might have been anticipated. Wolf v. Ford, 7 App. 461, 27 O. C. A. 417, 29 C. D. 325.

(b) Yes.

The defendant is liable. Where two causes combine to produce an injury to an occupant of a vehicle passing over a bridge in a public road, both of which are in their nature proximate, the one being a culpable defect in the bridge and the other an occurrence as to which neither party was at fault, those whose duty it was to maintain the bridge in a reasonably safe condition will be liable to the injured person." Railway v. Helber, 91 O. S. 231, 110 N. E. 481.

It may be said generally that the proximate cause of a result is that which in a natural and continued sequence produces the result and without which it would not have happened. The fact that some other cause operated with the negligence of a defendant in producing an injury does not relieve him from liability, where such other cause would not have produced the injury but for defendant's negligence. 91 O. S. 231 at p. 241, 110 N. E. 481.

(15)

In what respect does an action for false imprisonment differ in its essential requisites from an action for malicious prosecution?

The chief difference between an action for false imprisonment and an action for malicious prosecution is that the former is an action for an injury to one's liberty while the latter is for an injury to one's reputation. The essential requisites of an action for false imprisonment are that the plaintiff was unlawfully detained by the defendant and his powers of locomotion circumscribed and restrained. For an action for malicious prosecution it is necessary that the defendant maliciously and without probable cause, caused a criminal prosecution to be brought against the plaintiff which prosecution has terminated in the plaintiff's favor. Burdick on Law of Torts, p. 285, Malicious Prosecution and p. 275-7, False Imprisonment.

There is a sharply drawn distinction between false imprisonment and malicious prosecution. In the former the detention is unlawful. In the latter, if there has been an arrest, it is assumed to be lawful. Malice is not required to be established in actions for false imprisonment. It is essential in actions for malicious prosecution; as well as want of probable cause. Chapin on Torts, p. 477.

(16)

Discuss comprehensively but briefly the different character of wrongful acts which do, or do not make the person committing the acts liable for the damages sustained by the wife of the person injured by such wrongful acts, which damages arise from the loss of the consortium for her husband caused by his said injuries.

The general rule in Ohio is that;

"A wife has a right of action for damages, for loss of consortium, where the tort against the husband is a wilfull and malicious interference with the family relation, but not where the injury is merely due to the negligence of a third party. Some illustrations of this rule are as follows:

A married woman may maintain an action against one who continues to sell morphine to her husband whereby such husband's mind becomes impaired and it is necessary to confine him in an insane asylum, if the seller of such drug knows that the buyer has become weakened in body and mind by the continued use of morphine so that he is unable to resist his cravings therefor, and if such married woman has repeatedly protested against such sales by the defendant. Flandermeyer v. Cooper, 85 O. S. 317, 98 N. E. 102, Aff. 12 C. C. (N. S.) 369, 21 C. D. 402.

"A wife may maintain an action for the loss of the society and companionship of her husband, against one who

wrongfully induces and procures her husband to abandon or send her away but the acts of the defendant that caused the alleged injury must have been malicious." Westlake v. Westlake, 34 O. S. 621.

"The marital relation is invaded and a cause of action for alienation of affection accrues, whenever a third person by enticement, seduction or other wrongful and intentional interference with the marriage relation, deprives either husband or wife of the consortium of the other." Smith v. Lyon, 9 App. 141, 29 O. C. A. 492.

"In an action for the alienation of affections it is necessary to prove legal malice, which may be established and shown by preponderance of the evidence, and such malice may be inferred by the jury from the facts and circumstances of the case and from the conduct of the parties." Sturtevant v. Sturtevant, 10 App. 132.

"A wife has no right of action against a person for the loss of the consortium of her husband caused by personal injuries sustained by him through the negligence of such person." Smith v. Building Co., 93 O. S. 101, 112 N. E. 204.

"A wife cannot recover from one whose negligence caused her husband's injury for loss of wages due to the fact that she gave up her separate employment to nurse him. Griffin v. Realty Co., 15 N. P. (N. S.) 123, 27 D. 585.

(17)

(a) What is a Tort?
(b) Give distinction between a Tort and Contract.

(a) A tort is any wrong not consisting in mere breach of contract, for which the law undertakes to give the injured party some appropriate remedy against the wrongdoer. Cooley on Torts, p. 2.

A tort is an action or omission in violation of a duty prescribed by law, giving rise by virtue of common law jurisdiction of the court, to a civil action for damages, which is not an action on contract. Hale on Torts § 1.

A tort is an act or omission which unlawfully violates a person's right created by the law, and for which the appropriate remedy is a common law action for damages by the injured person. Burdick on Torts, 3rd Ed., § 14, p. 12.

(b) An action in tort is founded upon the breach or violation of rights which one inherently has by law in his person, property and reputation, while an action in contract is for damages for breach or curtailment of rights acquired by agreement.

The test to be applied is the nature of the right which has been invaded. If this right was created by agreement of the parties, the plaintiff is limited to an action ex-contractu. If it was created by law he may sue in tort. Burdick on Torts, 3rd Ed., § 18, p. 16.

(18)

What is the law in Ohio of contributory negligence? Is there an exception to this rule? If so, state what it is.

Contributory negligence has been well defined as a want of ordinary care upon the part of a person injured by the actionable negligence of another, combining and concurring with that negligence, and contributing to the injury as a proximate cause thereof, without which the injury would not have occurred. Winters v. Railway, 3 O. L. R. 361.

Contributory negligence on the part of a plaintiff implies negligence on the part of the other party; it cannot exist without. It is want of ordinary care by a person injured by the negligence of another, concurring with such negligence and thus contributing to the injury as a proximate cause. Cinncinnati Traction Co. v. Forrest, 73 O. S. 15, 75 N. E. 818.

Contributory negligence of the plaintiff is fatal to recovery. Puccini v. Cincinnati, 3 N. P. (N. S.) 362, 15 D. 608.

Unless the contributory negligence is a proximate cause or directly contributes, to the injury, it will not preclude recovery. Schweinfurth v. Railway, 60 O. S. 215, 54 N. E. 89.

A petition need not negative contributing negligence unless the other averments necessarily imply its presence. Railway Co. v. Nolthenuis, 40 O. S. 376.

Contributory negligence is an affirmative defense, and in an action for wrongful death, the burden of proving it rests on the defendant. Shear Co. v. Hathway, 7 C. C. (N. S.) 242, Aff. 72 O. S. 623, 176 N. E. 1126.

YES.

LAST CLEAR CHANCE DOCTRINE is an exception. It is a well settled rule, of the law of negligence, that the plaintiff may recover, notwithstanding that his own negligence exposed him to the risk of injury of which he complains, if the defendant, after he became aware, or ought to have become aware, of plaintiff's danger, failed to use ordinary care to avoid injuring him, and he was thereby injured. The rule that the negligence of the injured party, which proximately contributes to the injury, precludes him from recovering, has no application where the more proximate cause of the injury is the omission of the other party, after becoming aware of the danger to which the former party is exposed, to use a proper degree of care to avoid injuring him. R. R. v. Kassen, 49 O. S. 230, 31 N. E. 282, Aff. in Brown v. Traction Co., 76 O. S. 234, 81 N. E. 326; West v. Gillette, 95 O. S. 305, 116 N. E. 521.

Also, Workmen's Compensation is an exception—i.e., where an employer has not paid his premium into the com-

pensation fund as is required by law, he is denied the benefit of the defense of contributory negligence.

(19)

A child riding with its father was injured, which injury was the result of the concurrent negligence of the father and the railway company. The child was not guilty of any fault or negligence. Has the child a cause of action against the railway company?

Yes.

There is no imputed negligence in Ohio.

The doctrine of imputed negligence does not prevail in Ohio and a child of tender years, injured by the fault of another, is not deprived of the right of action, by reason of contributory negligence on the part of the parent or guardian. R. R. Co. v. Manson, 30 O. S. 451.

(20)

N's negligence contributed toward getting him into a place of danger, but he was not further negligent, and there was sufficient time from the ceasing of his negligence for C to have avoided the accident after knowledge of N's situation.

Would C be liable or not? Why?

YES.

Doctrine of last clear chance applies. "It is a well established rule of the law of negligence, that the plaintiff may recover notwithstanding that his own negligence exposed him to the risk of the injury of which he complains, if the defendant, after he became aware, or ought to have become aware, of the plaintiff's danger, failed to use ordinary care to avoid injuring him and he was thereby injured. R. R. Co. v. Kassen, 49 O. S. 230, 131 N. E. 282.

The doctrine of "last clear chance" applies only where plaintiff's negligence may have contributed toward getting him into a position of danger, but all negligence on his part had ceased for a sufficient time prior to the accident, to have enabled the defendant after it knew of his situation of peril, to have avoided the accident. Penn. Co. v. Hart, 101 O. S. 196, 128 N. E. 142, (reversing Penn. Co. v. Hart, 29 C. D. 465).

(21)

What is the law of Ohio as to the liability of joint tort feasors?

THEY ARE JOINTLY AND SEVERALLY LIABLE.

"If Maple has collected the damages against G, he is not entitled to recover against Y and Z. The mere recovery of a judgment against G did not bar action against Y and Z."

The fraud was the act of the company by its agent. If they conspired together to commit the fraud they were joint tort-feasors; could be sued jointly or severally. In such a case a judgment against one, without satisfaction against one, could not be pleaded in bar by the other. Maple v. R. R., 40 O. S. 313 at p. 316.

If the party wronged elects to proceed against one or more of the wrong-doers less than all, the beginning of the suit is not a release of the others, but he may sue them afterwards. Neither is the recovery of a judgment a bar to further suits against the others. But the injury being joint, and a recovery against one being for all the damages supposed to have been sustained, the satisfaction of that judgment is a complete bar. If several suits are brought, there may be several judgments in plaintiff's favor, and possibly in different sums. He may proceed on all until satisfaction of one is obtained. Whether this is larger or smaller than the others is unimportant as bearing on this rule; he may collect the largest if he can, but the collection of the smallest is equally a satisfaction; and so is the acceptance of something in satisfaction without taking out execution. But he is entitled to costs in all cases. Cooley on Torts, p. 39. Struthers v. Falabielo, Admx., 13 App. 341, 32 O. C. A. 92. See also, Adams Express Co. v. Beckwith et al., 100 O. S. 348, 126 N. E. 300.

Where joint tort feasors knowingly and wantonly commit a wrong, there is in general no right of contribution among them but in case the act is innocently done, it may be had. Acheson v. Miller, 2 O. S. 203.

(22)

A nurseryman drove his horse hitched to a wagon to a place in your city where he was putting in some shrubbery. The horse was left at the side of the street without being securely tied, or otherwise secured. A paper blew under the horse which scared it and it ran away colliding with the automobile of your client who was without negligence, injuring him. Has or has not your client a cause of action against the nurseryman for the damage, and why?

YES.

The negligence of the nurseryman in leaving his horse unhitched was the proximate cause of the accident. To make negligence a proximate cause of an injury, it is not essential that the precise result which occurred should have been anticipated; IT IS SUFFICIENT IF RESULTS OF GENERAL CHARACTER IN THE LIGHT OF THE CIRCUMSTANCES SHOULD HAVE BEEN ANTICIPATED BY ORDINARY FORESIGHT. Marsh v. R. R., 7 C. C. (N. S.) 405, 28 C. D. 9.

(23)

Can a minor child be guilty of contributory negligence?

Yes.

An infant, over fourteen years of age, is presumed to be sui juris in the sense that he is chargeable with negligence, but the measure of his responsibility in that regard is a question for the jury. New York, Chicago & St. Louis Ry. Co. v. Gulla, 15 C.C.(N.S.) 540, 24 C.D. 1, Aff. 86 O.S. 341, 99 N.E. 1130.

(24)

Is contributory negligence a defense to the last clear chance doctrine?

Yes.

This results, for if negligence of the plaintiff occurred concurrently with that of the defendant, there is no opportunity for the application of the last clear chance doctrine.

The doctrine of last chance has no application in a case where the negligence of plaintiff was concurrent with that of the defendant, but applies only after the discovery by defendant of plaintiff's peril. Notkin v. Bardes, 10 App. 391, 394.

(25)

M and two companions were trespassers while fishing on the premise of C. C was advised of their presence and about 3:30 o'clock A. M. secured a loaded shotgun and proceeded to the place where the parties were fishing. On the way C's servant informed him that three colored men were fishing, and that he had told them to leave the premises and they refused. C arriving at a point about 200 feet from the men, without warning, fired the gun in that direction, a shot penetrating and causing loss of one eye of M. Has M, a trespasser, a right to recover damages from C? Why?

Yes.

A mere trespass on real estate does not justify the owner in the use of fire arms in driving the trespassers from the premises, and where a jury has found from the testimony of the owner himself that he had no reason to fear that the trespassers would do him great bodily harm, a judgment for damages in favor of one of the trespassers who was shot and injured will be sustained. Cordes v. Mason, 14 C.C.(N.S.) 70, 22 C.D. 530.

(26)

L and K owned adjoining lots. L erected on his lot a board fence as high as the roof of K's house, which fence shut off light and air from the windows of K's house, to its injury. L erected this fence for no useful or ornamental purpose but from motives of unmixed malice toward K and

to annoy K and make the house uninhabitable or undesirable for use as a hotel and boarding house. Is K entitled to any relief, legal or equitable? Why?

No.

In an identical case, it was held:

That L had a legal right to erect and maintain such fence, and that neither law nor equity could compel its removal. Letts v. Kessler, 54 O.S. 73, 40 L.R.A. 177n.

As long as L keeps on his own property, and causes an effect on the property of K, which he has a right to cause, K has no legal right to complain as to the manner in which the effect is produced, and to permit her to do so, would not be enforcing a right of property, but a rule of morals. Supra, p. 81.

(27)

(a) Must the employer make the place of employment absolutely safe?

(b) Is an employer an insurer of the safety of an employe?

(c) Is there any duty upon the employe or servant to use any care as to his own safety or to make any investigation as to the condition of his place of employment or the appliances and instruments to be used in the performance of his work?

(a) No.

It is the duty of an employer to exercise ordinary care for his employe's safety, but this duty is not absolutely and at all events to provide a safe or a reasonably safe place to work and safe or reasonably safe instrumentalities, but only to exercise ordinary care to do so. Marble & Shattuck Chair Co. v. Mondrzecki, 17 C.C.(N.S.) 532, 22 C.D. 270; App. 80 O.S. 536; see also, Cincinnati, etc., Ry. Co. v. Frye, 80 O.S. 289.

(b) No.

It cannot be held, without absolute danger to all industry, that an employer is an insurer of the place of employment, the safety of the employment and safety devices and safeguards unless they are specifically named, or the methods or processes employed unless they are named by statute. Vaytor v. Terminal & Ry. Co., 18 N.P.(N.S.) 307.

(c) Yes.

The duty of a servant to use ordinary care for his own safety, requires of him more than a passing glance to discover whether or not the appliance he is using is defective. Hollenden Hotel Co. v. Sandrowitz, 16 C.C.(N.S.) 577, 27 C.D. 598; Aff. 80 O.S. 739.

(28)

A, B and C own adjoining lots. A's lot is north of B's and C's lot is south of B's. B excavates for a building on

his lot to a depth of twelve feet below the established grade of the street or the abutting land of A. A had a cellar wall of a depth of ten feet below the established grade of the street. A's building falls and A suffers loss and damage thereof.

Adjoining C's property B excavates to a depth of eight feet below the established grade of the street. C's adjoining foundation walls were six feet below the established grade. The wall of C's building falls and C's property is damaged.

Before making excavations for his building B gave notice to both A and C as to the kind of a building that he contemplated building and the depth of excavations.

Have A and C rights of action against B? Why?

B claims that the damages were not due to any excavation made by him but were caused by an unprecedented flood constituting an act of God.

Would such a defense, if established, be a good defense?

A has a right of action against B, but C has not.

By G.C.§§ 3782, 3783, liability occurs when an owner of a lot excavates more than nine feet below the grade of the street, and an adjoining building collapses. See Foss-Schneider Brewing Co. v. Ulland, 97 O.S. 210; Davis v. Sap, 20 App. 180.

The defense of unprecedented flood would be a good defense.

Where an excavation to a depth greater than nine feet below the curb grade has not caused the damages complained of, the fact that the owner of the lot has caused such excavation to be made upon his premises does not deprive him of any right that he would otherwise have to protect his property from the flood waters of an extraordinary and unprecedented flood. 97 O.S. 210, Supra.

(29)

The New York Sun published a series of articles in which it ridiculed a certain English professor named Triggs. For instance, it quoted various selections from Shakespeare and turned them into Triggsian English, a very modern and slangy interpretation. Triggs sued for damages, without alleging any special damage. Could he recover? Why?

Yes.

To constitute a publication respecting a person libelous per se, it must appear that the publication reflects upon the character of such person by bringing him into ridicule, hatred or contempt, or affects him injuriously in his trade or profession. Cleveland Leader Printing Co. v. Nethersole, 84 O.S. 118, 95 N.E. 735.

(30)

Brown sued Smith for malicious prosecution. Smith's evidence showed that he called upon his attorney before he

instituted the prosecution and presented to him the facts in full; that his attorney advised him to institute it and continued to advise him throughout the prosecution. Is this a defense to the action? Why?

Yes.

If the party causing the arrest in good faith laid the facts before an attorney and acted upon his advice in causing the arrest to be made, such advice is conclusive evidence of probable cause for the institution of the prosecution. Cincinnati, Hamilton & Dayton Ry. v. Winnes, 25 C.C.(N.S.) 321.

(31)

(a) Mrs. Jones was injured by the Cleveland Ry Co. and brought suit alleging permanent injury, pain and suffering, and recovered a judgment, which was paid. After payment, Mr. Jones, her husband, brought suit against the Cleveland Ry Co. charging the same acts of negligence on the part of the company and asking for a recovery on his behalf by reason of the injuries to his wife, asking for damages by reason of the loss of service of his wife, and for money expended for medical treatment. Can he recover?

(b) If the circumstances are reversed and Mr. Jones was injured, sued and was paid his judgment, can Mrs. Jones recover on an action for the loss of her husband's companionship and medical expenses?

(a) Yes.

At common law, a husband has a right of action against one who wrongfully, or through negligence injures his wife, to recover for the resulting loss of her services, and for his necessary medical, surgical and other expenses in healing her injuries; and this right of action is not abridged or affected by the legislation embraced in R.S.§§ 3108 to 3117 (now G.C.§§ 7995 to 8004). B. & O. Ry. v. Glenn, 66 O.S. 395; App. Bechtol v. Ewing, 89 O.S. 53, 58; Smith v. Nicholas Bldg. Co., 93 O.S. 101, 104; Clutz v. Hess, 28 O.C.A. 81, 84.

(b) No.

A wife has no right of action against a person for the loss of the consortium of her husband caused by personal injuries sustained by him through the negligence of such person. Smith v. Nicholas Bldg. Co., 93 O.S. 101, 112 N.E. 204.

(32)

(a) Can a person voluntarily walking upon a city sidewalk which he knows to be in dangerous condition recover for injuries sustained, even if the city's negligence be shown? Give reasons.

(b) When, if ever, can you recover against the city for injuries sustained by reason of defects in the sidewalk?

(a) No.

An action does not lie against a municipality for injuries received by a pedestrian on a defective sidewalk, where it appears from the testimony that the plaintiff was fully aware of the condition of the walk and attempted to pass over it regardless of the danger. Adams v. Zanesville, 30 O.C.A. 319.

The defect in the sidewalk was known to plaintiff and the danger obvious, and such that a reasonably prudent person would not have ventured thereon. There was danger ahead, the peril was well-known to plaintiff, and yet she voluntarily and unnecessarily "pressed on," not using or exercising that prudence and care that a reasonably careful person would or should, under such circumstances, and therefore she did so at her own risk. Supra, p. 320.

(b) When you have shown that it (the city) had actual or constructive knowledge of its defective condition and has failed to repair it within a reasonable time, under the statutory duty of G.C.§ 3714. Cleveland v. Hanson, 15 App. 409, 419; App. in 105 O.S. 646.

(33)

(a) The Ohio Coal Co. with malice and without cause sued Smith in a civil action, obtained a temporary injunction and prevented Smith from entering upon certain coal lands and carrying on a profitable coal mining business. The Ohio Coal Co. later dismissed its action. Smith goes to you for advice. What kind of an action, if any, would you advise him to bring and what would you claim the measure of damages to be?

(b) If the Coal Co. retained you, what defense could you set up to a suit brought by Smith?

(a) Malicious prosecution.

The measure of the damages is the value of the right of Smith to possess his property and prosecute his business during the period of ouster and suspension, i. e., the value of the use of the property, in the business, during that time. The quantity and quality of the coal there and then minable; the expense required to put and keep the mines in operation; the nature and extent of the facilities for transporting the coal to market; the extent of the demand for such coal; the cost of placing the coal in market and its market price; the relation of the parcel of land in question to other mining properties of Smith, are all facts that naturally and materially affected the value of the use in question. Newark Coal Co. v. Upson, 40 O.S. 17.

(b) Advice of counsel.

Where a petition charges not only the institution but the maintenance of a malicious prosecution, the defense of "advice of counsel" is a complete defense only when it covers the time from the institution to the final disposition

of the prosecution. Woodruff v. Paschen, 105 O.S. 396, approving Ash v. Marlowe, 20 O. 119.

(34)

Jones, while driving his machine down a public street, was struck and injured by electric wires falling upon his machine. He sued the Light Co. owning the wires for his injuries, invoking the rule res ipsa loquitur. The Light Co. defended on the grounds that the wires were blown down by a severe wind and rain storm and pleaded that the injuries were caused by "an act of God."

Who should prevail? Give reasons for answer.

The Light Company.

A presumption of negligence arises from proof of the falling of poles and electric wires upon the plaintiff's automobile in a city street. The maxim res ipsa loquitor, applies, requiring an explanation of the cause from the defendant.

But where the proof raises a probability that such falling poles and wires were caused by a vis major, the presumption of negligence does not arise. In such case, the plaintiff must sustain his specific allegations of negligence by a preponderance of the evidence. Loomis v. Toledo Ry. & Light Co., 107 O.S. 161, 140 N.E. 639; App. Glowacki v. Northwestern Ohio Ry. & Power Co., 116 O.S. 451, 463.

(35)

H, standing at a regular stopping place, waiting to board a street car, was injured by a falling trolley pole. Has he a right to action against the street railway for damages? Why?

Yes.

Proof of the falling of a trolley pole from an electric car, when it stopped at a usual stopping place, upon a person standing there for the purpose of getting upon the car, raises the presumption of negligence on the part of the traction company, and unless rebutted the party injured is entitled to recover. Cincinnati Trac. Co. v. Holzenkamp, 74 O.S. 379, 78 N.E. 529; App. Eddlestein v. Cook, 108 O.S. 346, 350.

It is the doctrine of res ipsa loquitor (the thing speaks for itself). The maxim is thus stated in Shearman and Redfield on Negligence, § 59:

"Proof of an injury, occurring as the proximate result of an act of the defendant, which would not usually, if done with due care, have injured anyone, is enough to make out a presumption of negligence. When a thing which causes the injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen, if those who have the manage-

ment use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care." Supra, 74 O.S. 379, 386.

(36)

A and W were partners. They owned a furnished house. Some of the furniture was stolen from the house. A had good reason for suspecting W. A said to B, "I know who the thief is. W stole that furniture." In an action by W against A are the above words actionable per se? Why?

No.

One of two partners cannot be guilty of burglary or larceny in respect to a house or goods of which the ownership and possession are in both partners. An entry of such house, and carrying away of such goods by one of the partners, would not subject him to a criminal prosecution, either at common law or by statute. Therefore, words charging a partner with such conduct, are not actionable, without special damage. Afele v. Wright, 17 O.S. 238.

(37)

X, a plumber, is sent by his employer to fix some pipes in the S Hotel. He goes to the rear entrance of the hotel, walks down a well lighted hallway and seeking a way to the basement opens a door, steps through and plunges into the freight elevator shaft and is injured. Can he recover damages from the S Hotel? Why?

No; because of his contributory negligence.

In a similar case, it was held that:

While the fact that the plaintiff was upon the premises of the defendant upon invitation, imposed upon the defendant the duty to have his premises in a reasonably safe condition, and to warn plaintiff of latent or concealed perils of which defendant knew, and entitled plaintiff to rely upon the performance of that duty by the defendant, yet that relationship did not entitle him to act in a wholly heedless manner, in total disregard of his own safety. He had a right to assume, and act upon the assumption, that the premises were in a reasonably safe condition, that the provisions of the ordinance and the state law with reference to elevators, elevator shafts, and elevator doors had been complied with, and that he would be warned of latent and hidden perils of which the defendant knew, but he was not thereby absolved from the duty of exercising for his own safety ordinary care and of employing the senses with which nature had provided him. Flury v. Cent. Pub. House, 118 O.S. 154, 164.

(38)

S was taking care of T during the latter's illness. S asked Dr. Jones, the attending physician, if T was suffering

from any contagious disease and Dr. Jones assured S that T was not. T died from a highly contagious disease known as black smallpox. S subsequently died from the same disease. Can his administrator recover damages from Dr. Jones? Why?

Yes.

It is the duty of a physician who is treating a patient afflicted with smallpox to exercise ordinary care in giving notice of the existence of such contagious disease to other persons who are known by the physician to be in dangerous proximity to such patient; and a failure to discharge this duty will constitute negligence on the part of the physician available to any person in the recovery of damages resulting directly and proximately from such neglect on the part of the physician. Jones v. Stanko, 118 O.S. 147.

(39)

By statute in Ohio, you can attach property of a non-resident defendant in a case where you seek damages for personal injury by negligent or wrongful act. Your client desires to file a slander suit against a non-resident defendant who has property in your county. Can your client attach this property? Why?

Yes.

The words "personal injury" as defined by lexicographers, jurists and text writers, and by common acceptance, denote an injury either to the physical body of a person or to the reputation of a person, or to both.

The words "personal injury" by "wrongful act," of G.C. § 11819, comprehend, among other injuries to the person, injury by libel or slander. Smith v. Buck, 119 O.S. 101, 162 N.E. 46.

Wills

(Numbers in parenthesis refer to answers following.)

I. NATURE AND EXTENT OF TESTAMENTARY POWER.

A. Property and Rights Subject to Testamentary Disposition; Property of Another. (40)

Wills, 6 to 10.

6 O.S. 480; 57 O.S. 562; 81 O.S. 196; 111 O.S. 426; 20 D. 106.

B. Restrictions on Will Making; Bequests to Charity. (20b, 30, 35, 36)

Charities, 3 et seq.

Deibel's Ohio Probate Manual, § 584; G.C.§§ 8622, 10504; 70 O.S. 92; 98 O.S. 428.

II. TESTAMENTARY CAPACITY. (12a, 15, 20a)

Wills, 16 to 34.

Deibel's Ohio Probate Manual, §§ 590, 592; G.C.§ 10503; 97 O.S. 145; 118 O.S. 442; 26 N.P.(N.S.) 112.

III. CONTRACTS TO DEVISE OR BEQUEATH. (5, 27)

Wills, 38 to 44.

Deibel's Ohio Probate Manual, § 571; 16 O.S. 595; 65 O.S. 86; 104 O.S. 556.

IV. REQUISITES, VALIDITY AND EXECUTION.

A. What Law Governs. (19b)

Wills, 5, 62.

Deibel's Ohio Probate Manual, § 573; G.C.§ 10535; 8 O. 239; 13 O.S. 458; 15 O.S. 537; 59 O.S. 402; 96 O.S. 10; 7 C.D. 326; 8 N.P. 86.

B. Contents and Requisites in General; Incorporation by Reference. (12, 14, 23, 38)

Wills, 55 to 58, 63, 64.

Deibel's Ohio Probate Manual, §§ 553 to 561; 567 to 570; 56 O.S. 464; 23 N.P.(N.S.) 158.

C. Signature of or for Testator; Seal. (4, 7, 9, 10, 34, 38, 41)

Wills, 65 to 68.

G.C.§ 10505; W. 54; 17 O.S. 135; 51 O.S. 217; 71 O.S. 395; 77 O.S. 104; 80 O.S. 691; 22 App. 430; 20 C.C.(N.S.) 142.

D. Attestation and Subscription by Witnesses. (8, 9, 31, 38, 41)

Wills, 69 to 75.

G.C.§§ 10505, 10515; 56 O.S. 431; 101 O.S. 306; 25 C.C.(N.S.) 485.

[*References are to Bates' Compact Ohio Digest.*]

V. CODICILS. (18, 19a)

Wills, 76.

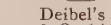
16 O.S. 586; 22 N.P.(N.S.) 385; 26 N.P.(N.S.) 112.

VI. NUNCUPATIVE WILLS. (3, 13b)

Wills, 79 to 82.

Deibel's Ohio Probate Manual, § 690; G.C.§§ 10601 to 10603; 8 O. 144; 16 C.C.(N.S.) 404; 1 C.D. 464.

VII. MISTAKE, UNDUE INFLUENCE AND FRAUD. (38)



Wills, 86 to 94.

G.C.§§ 10503, 10563; 17 O.S. 302; 20 App. 215; 23 App. 522.

VIII. REVOCATION AND REVIVAL. (1, 2, 3, 19, 21, 25, 29, 33, 44)

Wills, 98 to 116.

Deibel's Ohio Probate Manual, §§ 642 to 652; G.C.§§ 10555 to 10562; 9 O.S. 382; 10 O.S. 204; 15 O.S. 234; 27 O.S. 298; 48 O.S. 211; 79 O.S. 71; 6 C.C.(N.S.) 156.

IX. PROBATE OF WILLS; DUTY TO PRODUCE. (19b)

Wills, 120 to 252.

Deibel's Ohio Probate Manual, §§ 594 to 617, 622 to 641; G.C. §§ 10506 to 10554; 13 O.S. 458; 116 O.S. 144; 17 App. 114; 25 App. 520; 26 N.P.(N.S.) 209.

X. CONSTRUCTION AND OPERATION OF WILL; AFTER ACQUIRED PROPERTY. (11, 17, 19a, 23, 39, 42, 43)

Wills, 9, 256 to 340.

See Ans. 11, Memory Work; Deibel's Ohio Probate Manual, §§ 576 to 588, 665 to 667; G.C.§§ 10576 to 10580; 77 O.S. 71; 114 O.S. 535; 115 O.S. 139; 116 O.S. 684; 20 App. 279; 24 App. 117; 25 App. 48; 25 App. 242; 29 C.C. 65; 26 N.P.(N.S.) 14.

XI. ESTATES IN GENERAL AND BY IMPLICATION, REMAINDERS.

Wills, 343 to 348.

1 O.S. 279; 38 O.S. 538; 40 O.S. 353; 40 O.S. 591; 46 O.S. 391.

XII. ESTATES IN FEE-SIMPLE AND LESSER ESTATES. (16, 37)

See Real Property, I.

XIII. APPLICATION OF RULE IN SHELLY'S CASE.

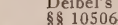
Abrogated by G.C.§ 10578.

XIV. VESTED OR CONTINGENT ESTATES AND INTERESTS, CONDITIONS AND RESTRICTIONS. (35, 41)

Wills, 347, 384 to 420.

Deibel's Ohio Probate Manual, § 566; 33 O.S. 128; 101 O.S. 306; 18 App. 136; 24 App. 331.

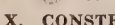
XV. ESTATES IN TRUST AND POWERS.



Wills, 424 to 436.

G.C.§§ 10591 to 10600; 98 O.S. 315; 24 App. 117; 19 D. 71.

XVI. ACTIONS TO CONSTRUE OR TO CONTEST WILLS; APPEAL. (6, 7, 22)



Wills, 130 to 134, 161 to 165, 440 to 450.

Deibel's Ohio Probate Manual, §§ 575, 618 to 621; G.C.§§ 10531, 10857, 12079 to 12087; 118 O.S. 442.

XVII. RIGHTS AND LIABILITIES OF DEVISEES AND LEGATEES.

A. Nature of Title and Rights in General.

Wills, 453 to 465.

9 O. 96; 14 O.S. 339; 25 O.S. 477; 111 O.S. 369; 6 C.C. 587.

B. Specific, Demonstrative and General Devises and Bequests.

Wills, 468 to 470.

1 O. 64; 17 O.S. 413; 8 App. 66; 13 C.D. 408.

C. Advancements. (13d, 24, 26b)

Wills, 473 to 480.

G.C.§§ 8585 to 8588, 10565; 7 O.S. 432; 17 O.S. 578; 7 N.P. 520.

D. Ademption. (17)

Wills, 481 to 483.

G.C.§§ 10556, 10557, 11558; 10 O. 64; 91 O.S. 339; 29 C.C. 65.

E. Lapse. (28)

Wills, 484 to 486.

Deibel's Ohio Probate Manual, § 668; G.C.§§ 8576, 10581; 46 O.S. 307; 59 O.S. 1; 62 O.S. 411; 119 O.S. 17; 5 App. 312.

F. Election by Widow or Widower. (13c)

Wills, 490 to 509.

Deibel's Ohio Probate Manual, §§ 653 to 662; G.C.§§ 10566 to 10575.

G. Abatement.

Wills, 514, 515.

Deibel's Ohio Probate Manual, § 565(9); 3 B. 571.

H. Legacies Charged on Property, Estate or Interest.

Wills, 518 to 532.

19 O. 282; 17 O.S. 564; 64 O.S. 473; 103 O.S. 529; 111 O.S. 414.

I. Debts of Testator as Incumberances on Property.

Wills, 536 to 540.

Deibel's Ohio Probate Manual, §§ 812 to 826, 846; G.C.§§ 10585, 10714, 10746; 8 O. 127; 9 O. 197.

J. Void and Forfeited Devises and Bequests; Property and Interests Undisposed of. (13, 23, 26a, 28)

Wills, 543 to 546.

19 O.S. 546; 39 O.S. 590; 116 O.S. 144; 3 C.D. 589.

K. Rights and Remedies of Creditors of Devisees and Legatees.

Wills, 548 to 556.

Spendthrift Trust, Deibel's Ohio Probate Manual, § 584 (10); 62 O.S. 1; 7 O.F.D. 448; 9 O.F.D. 160.

XVIII. EXECUTORS AND ADMINISTRATORS. (32)

Executors and Administrators, 1 et seq.

Deibel's Ohio Probate Manual, §§ 691 to 1013; G.C.§§ 10604 to 10914.

XIX. GIFTS.

See Personal Property, X.

Definitions

WILL.—The disposition of one's property, to take effect after death. Bouvier's Law Dictionary, Baldwin's Revision.

BEQUEST.—The word "bequest" is commonly defined as a gift of personal property by will; but it is not necessarily confined to gratuity. Bouvier's Law Dictionary, Baldwin's Revision.

DEVISE.—A gift of real property by a last will and testament. Bouvier's Law Dictionary, Baldwin's Revision.

ATTESTATION.—Except nuncupative wills, every last will and testament must be in writing, but may be handwritten or typewritten. Such will must be signed at the end by the party making it, or by some other person in his presence and by his express direction, and be attested and subscribed in the presence of such party, by two or more competent witnesses, who saw the testator subscribe, or heard him acknowledge it. Throckmorton's General Code of Ohio, § 10505.

REVOCATION.—A will shall be revoked by the testator tearing, canceling, obliterating, or destroying it with the intention of revoking it, by the testator himself, or by some person in his presence, or by his direction, or by some other will or codicil, in writing, executed as prescribed by this title, or by some other writing, signed, attested, and subscribed, in the manner provided by this title for the making of a will, but nothing herein contained shall prevent the revocation implied by law, from subsequent changes in the condition or circumstances of the testator. Throckmorton's General Code of Ohio, § 10555.

If the testator had no children at the time of executing his will, but afterward has a child living, or born alive after his death, such will shall be revoked, unless provision has been made for such child by some settlement, or he is provided for in the will, or in such way mentioned therein as to show an intention not to make such provision. No other evidence to rebut the presumption of revocation shall be received. Throckmorton's General Code of Ohio, § 10561.

AFTER ACQUIRED PROPERTY.—Any estate, right or interest, in lands or personal estate or other property acquired by the testator after making his will, shall pass thereby, as if held or possessed at the time it was made, if such manifestly appears by the will to have been his intention. Throckmorton's General Code of Ohio, § 10579.

CONTRIBUTION.—When any estate, real or personal, devised, is taken from the devisee for the payment of the testator's debts, the other devisees and legatees must contribute their respective proportions of the loss to the person from whom it was taken, so as to make the loss fall equally on all the devisees and legatees, according to the value of the property received by each of them excepting as provided in the next following section. Throckmorton's General Code of Ohio, § 10583.

NUNCUPATIVE WILL.—A verbal will, made in the last sickness, shall be valid in respect to personal estate, if reduced to writing, and

subscribed by two competent disinterested witnesses, within ten days after the speaking of the testamentary words, if it also be proved by such witnesses, that the testator was of sound mind and memory, not under restraint, and that he called upon some person present, at the time the testamentary words were spoken, to bear testimony to such disposition as his will. Throckmorton's General Code of Ohio, § 10601.

EXECUTOR DE BONIS NON.—When a sole executor or administrator dies without having fully administered the estate, the court shall grant letters of administration, with the will annexed, or otherwise, as the case may require, to some suitable person, to administer the goods and estate of the deceased, not administered, in case there be personal estate to be administered to the amount of twenty dollars, or debts to that amount due from the estate. Throckmorton's General Code of Ohio, § 10631.

EXECUTOR DE SON TORT.—One who attempts to act as executor without lawful authority. Bouvier's Law Dictionary, Baldwin's Revision. [Ohio does not recognize an executor de son tort. 5 O. 533.]

HOLOGRAPHIC WILL.—The last will of a person, which in order to be valid must be wholly written, signed, and dated by the testator. Bouvier's Law Dictionary, Baldwin's Revision. [Holographic wills not recognized in Ohio.—Editor.]

RESIDUARY CLAUSE.—The clause in a will by which that part of the property is disposed of which remains after satisfying previous bequests and devises. Bouvier's Law Dictionary, Baldwin's Revision.

TESTAMENTARY CAPACITY.—A person of full age, of sound mind and memory, and not under restraint, who has property, or an interest therein, may give and bequeath it by last will and testament lawfully executed. Throckmorton's General Code of Ohio, § 10503.

The testator must be able to:

1. Understand the nature of the business in which he is engaged;
2. Comprehend generally the nature and extent of his property;
3. Hold in mind the names and identity of those who have natural claims upon his bounty;
4. To appreciate his relation to the members of his family.

Niemes v. Niemes, 97 O.S. 145, 119 N.E. 132.

ABATEMENT.—The reduction of a legacy, general or specific, on account of the insufficiency of the estate of the testator to pay his debts and legacies. Bouvier's Law Dictionary, Baldwin's Revision.

ADVANCEMENT.—A gift by anticipation from a parent to a child of the whole or a part of what it is supposed such child will inherit on the death of the parent. Bouvier's Law Dictionary, Baldwin's Revision.

ADEMPTION.—Ademption of legacies or devises means failure of them because the property no longer belongs to the testator at his death, it having either been given or sold to the donee, or to another person, or been destroyed. Deibel's Ohio Probate Manual, § 565.

OHIO STATE BAR EXAMINATIONS

QUESTIONS WITH ANSWERS

[*Arranged Chronologically.*]

(1)

Green, who lives in Columbus, Ohio, makes a will and deposits it for safe keeping in the probate court of Franklin county. He goes out West on an extended trip, and while in California he executes a new will in accordance with the Ohio law, making a different disposition of his property and also expressly revokes therein the former will that he had made. He retains possession of this second document until his return to Columbus. Then he destroys the second will with the intention of making an entirely new will, but he dies before he had done so. The original paper-writing which has never been withdrawn from the Franklin county probate court, is offered for probate and that proceeding is contested. What should be the ruling of the court, and why?

The first will is not the proper subject of probate, and the contestants should prevail.

"After making a will, if the testator duly makes and executes a second will, the destruction, canceling, or revocation of the second will, shall not revive the first will unless the terms of such revocation show that it was his intention to revive and give effect to his first will; or, after such destruction, canceling or revocation, he duly republishes his first will." G. C. § 10562.

"To revive a revoked will G. C. § 10562, requires acknowledgment before the former subscribing witnesses, or if before others they must sign the will or some other writing showing such intent or the testator must republish with the formalities attending the original execution." Collins v. Collins, 110 O. S. 105.

Here there was no intention that the first will be revived; the facts expressly show that he intended to make a third will.

(2)

Mrs. Jones executed a will at Springfield, Ohio, which she left with her attorney there for safe keeping. Later she went to a hospital, and before submitting to an operation, she directed her attorney in writing to destroy her will for the reason that a change she desired to make therein had not been made. This instruction was executed in due form by Mrs. Jones and given to her physician, who handed it back to her upon her recovery, and she retained possession of it until her death. Shortly after leaving the hospital, she called at her attorney's office to change her will,

but was unable to see the lawyer, who knew nothing about the paper-writing directing the destruction of the will. Mrs. Jones did nothing further in the matter, and died the next day. Should the will be admitted to probate.

Give reason for your answer.

Yes, the will was not revoked.

The statute prescribes the manner of revocation. See answer (3).

The instrument executed by testatrix was merely a direction to revoke. A revocation and a direction to revoke obviously are not the same thing. An intention to revoke must be carried out by an act of revocation to make it effectual. Lesnett v. Hunter, 15 App. 388, 32 O. C. A. 296.

"A written direction to the custodian of a will to dispose of it, is not a revocation if such custodian does not receive such instruction, and such will is not destroyed, at least if testator knows that it remains in existence."—Idem.

(3)

Matthews, having made his will in accordance with the requirements of the Ohio Law, was in his last sickness, but of sound mind and memory and not under any restraint. He desired to revoke that will, but not having it at hand, he called two competent, disinterested witnesses to whom he said: "I want both of you to bear witness to this my last will and testament. I desire to revoke absolutely the will I made last year which is in my safety deposit box, and I want my wife and my son Robert to have all my personal estate. But as my son Tom and my daughter Ruth have already been well provided for by me, I do not want them to have any of the personal property that belongs to me now." Matthews died that same day. The words quoted above were reduced to writing and subscribed by the witnesses within ten days, and the writing is promptly presented for probate as a nuncupative will. Should it be admitted as against the written document? Give reason for your answer.

No. The revocation statute provides that

"A will shall be revoked by the testator, tearing, cancelling, obliterating, or destroying it, with the intention of revoking it, by the testator himself, or by some person in his presence, or by his direction, or by some other will or codicil, in writing, executed as prescribed, by this title, or by some other writing signed, attested and subscribed, in the manner provided by this title for the making of a will; but nothing herein contained shall prevent the revocation implied by law, from subsequent changes in the condition or circumstances of the testator." G. C. § 10555.

Since this statute does not mention revocation by nuncupative will, a written will cannot be so revoked. Devisees of McCune v. House, 8 O. 144.

There are very good reasons why an individual, who has not yet executed a written will, should be permitted, under peculiar circumstances, to make a verbal will, but when he has already executed a written will with all the solemnities of the law, there are equally strong reasons why the revocation of it should be attended with the same solemnities. It is not in restraint of this free action; it is to protect him from a fraudulent conspiracy, very likely to take place, where he has already disposed of his property counter to the wishes of those who surround him." Id., p. 146.

(4)

Haynes made a will and signed it, but did not have it witnessed. There happened to be a small space left between the last dispositive clause and the testimonium clause at that time, and later Haynes added another clause making an additional devise of some of the property mentioned in the will. He thereupon had the will witnessed, but did not sign it again or acknowledge his signature to the witnesses, but merely asked the witnesses to sign as witnesses, to his will. Should that will be admitted to probate? Give reason for your answer.

No. The will was not signed "at the end." The statute provides:

"Except nuncupative wills, every last will and testament must be in writing, but may be handwritten or typewritten. Such will must be signed AT THE END by the party making it, or by some other person in his presence and by his express direction, and be attested and subscribed in the presence of such party, by two or more competent witnesses, who saw the testator subscribe or heard him acknowledge it." G. C. § 10505.

This means at the CHRONOLOGICAL end as well as the LOGICAL end, for the reason that the witnesses must attest the will the testator signed. Glancy v. Glancy, 17 O. S. 134.

(5)

Collins, who owns considerable improved real estate in Columbus, Ohio, makes a written agreement with Baxter whereby Baxter is to act as manager for Collins as long as Collins lives and that upon his death Collins will devise to Baxter and his heirs the building known as the Tremont Apartments in consideration for his services. Baxter performs his part of the agreement, but upon the death of Collins it is discovered he has left no will. What, if any, remedy has Baxter, and why?

This is a contract to devise real estate. Baxter has either of three remedies:

(a) Action in equity for conveyance of property in the nature of specific performance;

(b) Action at law for breach of contract; and

(c) Action for recovery of value of services in quantum meruit. Foltz v. Boone, 107 O. S. 562, 140 N. E. 761. Emery v. Darling, 50 O. S. 160, 33 N. E. 715.

(6)

Parker's will has been duly admitted to probate, and on the same day Parker's daughter, who is not satisfied with what she would receive under the will, consults you as to whether or not it is possible to have the order of probate set aside or reviewed on error. Assuming the facts your client states to you tend to show clearly that Parker was not of sound mind, and was unduly influenced at the time he made the will, how would you advise her, and why?

I would advise that her only recourse is to file a petition in common pleas court to contest the will. G. C. § 10531. This is in the nature of an appeal. Haynes v. Haynes, 33 O. S. 598, 618.

But she cannot appeal directly. Kamman v. Kamman, 6 App. 455, 26 C. C. (N. S.) 60, 29 C. D. 349.

Nor can she prosecute error. Hollrath v. Lasance, 63 O. S. 58.

Appeal lies only from an order denying probate. G. C. § 10532. Error also lies upon denial of probate. Missionary Society v. Ely, 56 O. S. 405, 47 N. E. 537.

(7)

Hadway, a creditor of Thomas Durrell, brings suit to contest the will of William Durrell, father of Thomas. The will has been admitted to probate in Adams County, Ohio, and when the will and proof of probate have been offered in evidence it appears that the testator could not sign his name and that the name "William Durrell" was written by the attorney on the line intended for the signature like this: "William (his mark) Durrell" and that the testator had made a cross mark X where his name appeared in the attestation clause like this "William X Durrell"—Both the plaintiff and the defendants rest without offering further evidence and both sides move for an instructed verdict. Plaintiff's motion is that the paper writing be found not to be the last will and testatment of William Durrell, and the motion of the defendants is for an instruction sustaining the will for the reason that plaintiff has no right to maintain the action. What should be the ruling on these motions? Why?

Defendant's motion should be overruled. Since the plaintiff is a creditor of a son of the testator, he is "inter-

ested" in a will affecting the son's inheritance, and may contest it.

Plaintiff's motion should be granted. The manner of signing appears on its face, and is undisputed. The sufficiency of the signing therefore becomes a question of law for the court. The will is not "signed at the end" as required by G. C. § 10505; the attestation clause only is complete. The X cannot properly be referred to the signature to the will. Herbster v. Pincombe, 31 O. C. A. 388; Bloor v. Platt, 78 O. S. 46, 84 N. E. 604; Sears v. Sears, 77 O. S. 104, 82 N. E. 1067.

(8)

A paper purporting to be the last will and testament of John Clinton is offered for probate in Ohio. The instrument is signed at the end, and there are two signatures namely, Henry Miller and Joseph Stone immediately below the signature of John Clinton.—There is no attestation clause embodied in the paper writing. Does this fact preclude the court from admitting the instrument to probate? Give reasons for your answer.

No.

Absence of an attestation clause in a will, the two witnesses merely signing under the testator's signature, does not invalidate a will, it being shown that they are witnesses. Underwood v. Rutan, 101 O. S. 306, 128 N. E. 78. See form of this will at bottom of p. 306.

An attestation clause, containing affirmation that the will was "published," though advantageous, is no essential part of a will, not being required by statute, and the instrument may be well executed without containing any such clause. In re Reckard, 15 N. P. (N. S.) 465, 24 D. 609.

(9)

Smith has consulted Walker of the law firm of Bowman and Walker in Ohio with regard to drawing his will. Walker has discussed the matter with his senior partner, Bowman, who has prepared the paper in accordance with Smith's wishes and instructions. It is in Walker's office when Smith comes in to sign it, and he does sign and declare the document to be his last will and testament in the presence of Walker who thereupon signs his name as witness, and tells Smith to take it in to Mr. Bowman for his signature. Smith thereupon takes the paper over to Mr. Bowman in his private office and simply hands it to him. Bowman recognizes the document as the one he prepared and recognized Smith's signature and the signature of his partner as a witness. Bowman thereupon signs the paper as susbscribing witness and Smith takes it away with him. When the will is presented for probate these facts develop. What should be the order of the court and why?

Probate denied. When the testator does not sign the will in the presence of a witness, he must acknowledge his signature, and declare it as his will.

Every will must be either signed in the presence of two of more witnesses, or must be acknowledged before them. This does not however mean that it must be signed or acknowledged in the presence of both witnesses at the same time. Eggleston et al. v. C. H. Gardner et al., 16 C. C. (N. S.) 455, 31 C. D. 627; Underwood v. Rutan, 101 O. S. 306, 128 N. E. 78; Keyl v. Feuchter, 56 O. S. 424, 47 N. E. 140.

In the present case, the signature was never witnessed by nor was it acknowledged before Mr. Bowman, who was relied on as one of the two subscribing witnesses.

(10)

Suit is brought to contest a will that has been admitted to probate in Ohio. The will was written on a double sheet of legalcap paper in the handwriting of the testator and the writing and the attestaion clause filled all four pages. When the will was offered for probate there was attached to it between the two sheets a small slip of note paper on which was written (also in the testator's handwriting) the following words: "And I also will and bequeath to my son Robert my house on Bond Street next door to where I now live. This is part of my will."—The will and proof of its probate were offered in evidence and thereupon the proponents of the will rested. The contestant then moved the court to direct the jury to return a verdict finding the paper writing in question not to be the last will and testament of the testator for the reason that it was not signed at the end thereof. What should be the ruling of the court on this motion, and why?

Motion overruled.

"A will written on two of the four pages of a double sheet of legalcap paper, signed at the end and complete in itself, excepting that a small piece of note paper contained a dispositive clause and not signed, was attached to the outside of the will, is not properly signed at the end as required by statute, if the slip of paper was written and attached before the will was signed, but if written subsequently to the execution of the will, such slip of paper amounts to nothing more than an unexecuted codicil. In such case the question as to the time when the attached paper was written is for the jury and it is error for this court to direct the jury to return a verdict setting aside the will." Syl., Smith v. Ellis, 15 App. 38.

(11)

Pruden left a will containing eight different articles or dispositive clauses. Clause No. 2 was as follows: "I here-

by give, devise and bequeath to my two daughters, Mary and Jane Pruden, my old homestead, Stone Cliff, together with all the land and buildings pertaining thereto, as I desire my two daughters to have this property for their home."—Article No. 7 of this will reads as follows: "I hereby give, devise and bequeath my house and homestead property on Edge-Cliff Road, and known as Stone Cliff to my daughter Mary Pruden, who has kept house for me many years."—Nothing further is said in any other part of the will about this property, and there is nothing further within the four corners of the instrument to indicate what Pruden's intention was with regard to it.—To whom does "Stone Cliff" descend, and why?

"Stone Cliff descends to Mary and Jane Pruden under clause number 2.

When a will is open to two constructions the one consistent and the other repugnant to law, or the one will give effect to the whole instrument and the other will destroy a part—the former must always be adopted. Charles W. James, Executor of Silas Pruden v. Mary Pruden et al., 14 O. S. 251.

It is true that where one devise is as specific as the other, if they are repugnant, the latter must prevail. Young v. McIntire, 3 O. 498. Coonrod v. Coonrod, 6 O. 114.

But the rule that where inconsistent estates are devised, both devises are not declared void, but the courts invariably modify or reject one or the other, is never applied if a possibility of reconciling them remains. Worman v. Teagarden, 2 O. S. 380; MacClement v. MacClement, 1 Dayton Term Reports, (Iddings) 101. Hamilton v. Stone, 13 C. C. (N. S.) 556, 23 C. D. 471.

(12)

(a) What is Testamentary Capacity, and what are the proper elements embodied in a definition of that term?

(b) What formalities are required in making a will, except a nuncupative will, in Ohio?

(a) See answer (15).

(b) The formalities are prescribed in G. C. § 10505; see answer (4).

(13)

(a) What is meant by the term "residuary legatee?"

(b) What is meant by a "nun-cupative will" and how is the same made and proven?

(c) What is meant by "election of widow or widower" and in what manner does it affect the will?

(d) What is meant by "advancements" and at anytime do they enter as part of assets of the estate? If so, How?

(a) The residuary clause in a will is that which dis-

poses of property of the testator not otherwise disposed of. Gardner on Wills, p. 369.

"Legatee" is one who takes personal property under a will. Gardner on Wills, p. 3.

Hence a residuary legatee is one who takes all the personal property of the testator, not otherwise disposed of.

(b) A nun-cupative will is an oral or verbal will.

"A verbal will made in the last sickness shall be valid in respect to personal estate, if reduced to writing, and suscribed by two competent disinterested witnesses within ten days after the speaking of the testamentary words, if it also be proved by such witnesses, that the testator was of sound mind and memory, not under restraint, and that he called on some person present, at the time the testamentary words were spoken to bear testimony to such disposition as his will." G. C. § 10601.

"No nuncupative will shall be admitted to record, unless it is offered for probate within six months after death of testator." G. C. § 10602.

(c) A widow or widower who has been left property by the will of his or her deceased consort, has the right to choose between one of two rights, viz: he may take under the will or he may take his distributive share and dower right as provided by law, but he cannot have both. The exercise of this right is known as "election."

"If the provision be made for a widow or widower in the will of the deceased consort, after the probate of such will, the probate court forthwith shall issue a citation to such widow or widower to appear and elect whether to take such provision or to be endowed of the lands of the deceased consort and take the distributive share of the personal estate." G. C. § 10566.

"If the widow or widower elects to take under the will, she or he shall be thereby barred of dower and such share of personalty, and shall take under the will alone, unless as provided in G. C. § 10569. But an election to take under the will does not bar the right to remain in the mansion of the deceased consort, or the widow to receive one year's allowance for support of herself and children, as provided by law, unless the will, expressly otherwise directs." G. C. § 10572.

When the widow elects to take her dower instead of under the will, the devisees, who are thereby prejudiced, are equitably entitled to compensation out of the rejected provisions made for her in the will. Jennings v. Jennings, 21 O. S. 56.

(d) An "advancement" is a term well understood in law to mean an irrevocable gift to a child in anticipation of such child's future share of the parent's estate, to be taken into account on distribution of the estate. Albrecht v. Fischer et al, Exrs., 14 App. 195 at p. 198.

Such advancement is deemed a portion of the estate and is charged to the party who has received it. G. C. § 10565.

The doctrine of advancements is not applicable when a will is made after such a gift to an heir. Needles v. Needles, 7 O. S. 432. In such case the presumption that a gift is an advancement, is rebutted by the will disposing of the property. And when gifts are made to a beneficiary of the will after execution, the doctrine of ademptions applies, which in like manner satisfies PRO TANTO the testamentary gift. Deibel's Probate Manual, § 565 (10). See also answer 400.

(14)

Draw a short form of will under the requirements of the statute of Ohio, in which John Smith bequeaths all his property, both real and personal, to his wife during her life, and at her death to his children in fee simple.

I, John Smith, of Columbus, Franklin County, Ohio, do hereby make my last will and testament. I appoint my wife, Mrs. John Smith sole executor of this will and direct that she shall not be required to give bond in qualifying as such executor. I give and bequeath to my wife, all my personal property for life, and after her death to my children who shall upon her death take such personalty in fee.

I grant and devise all my real estate to my wife, Mrs. John Smith for life and on her death to my children in fee: and all other property of which I may die seized, I give, grant, bequeath, and devise in the same manner.

In testimony whereof I have hereunto set my hand this.....day of..... in the year.....

John Smith.

Signed, published, and declared by above named, John Smith, as and for his last will and testament in presence of us, who in his presence, and in presence of each other, and at his request have hereunto subscribed our names as witnesses.

A. B.
C. D.

(For will forms see Deibel's Ohio Probate Manual, §§ 558 to 561.)

(15)

(a) What constitutes "testamentary capacity" as defined by the Supreme Court of Ohio?

(b) Is a minor competent to make a will under the laws of Ohio?

(a) "Testamentary capacity exists when the testator has sufficient mind and memory:

(1) To understand the nature of the business in which he is engaged;

(2) To comprehend generally the nature and extent of his property;

(3) To hold in his mind the names and identity of those who have natural claims on his bounty;

(4) To be able to appreciate his relation to members of his family." Niemes v. Niemes et al., 97 O. S. 143, 119 N. E. 503.

(b) No.

A person of full age, and of sound mind and memory and not under restraint, who has property or an interest therein may give and bequeath it by last will and testament lawfully executed. G. C. § 10503.

(16)

Brown, in his last will and testament, uses the following language:

"I give and bequeath to my beloved wife, Mary, all my real estate to be hers during her natural life, she, however, to have full power to sell and dispose of it as she deems advisable and make good deeds to any purchaser, but at her death any of said property remaining I give and bequeath to my brother John."

What estate did widow take under this devise in the will?

The widow takes a life-estate with power of alienation. Under similar facts it was held "that under this will the widow took only a life-estate in the property with power to bargain, sell, convey, exchange, or dispose of same, as she might think proper for consumption during her life and that what remained at the time of her death unconsumed, belongs to the remainderman designated in the will." Johnson v. Johnson, 51 O. S. 446, 38 N. E. 61. Followed in Tax Commission of Ohio v. Oswald, 109 O. S. 36.

(17)

Jones, in his last will and testament, made the following devise: "Item 1—I give all my personal estate to my sister Josephine. I give all my real estate to my sister Josephine, for and during her natural life, and at her death I direct that my executor sell my real estate and distribute the proceeds arising therefrom to my four nephews, share and share alike."

A week before Jones' death, he sold all his real estate and received one-half cash and the balance secured by mortgage for purchase price, which money and mortgage were intact at the time of his death.

The executor brought suit asking for construction of the will and instructions how to distribute the estate.

What part of the estate would the sister receive, and what part the four nephews?

The sister, Josephine, takes the entire estate. The sale by Jones converted his real estate into personalty and the devise was adeemed. It is generally held that where a specific legacy (or its proceeds, if ordered to be sold and distributed) is given by will, the devise or bequest is specific and a sale of the thing by the testator in his life-time revokes the devise or adeems the gift. The cash received was personalty in the hands of the executor, and the mortgage being merely to secure a debt, a chose in action, the debt was also a personal asset in the hands of the executor.

"A testator bequeathed all of his personal property to his sister, who had been his housekeeper for over fifty years, and also gave her an estate for life in a farm which he described as "the farm on which I reside, situate, etc.;" and directed that at her death his executor should sell such farm and all his real estate, and divide the proceeds among a niece and two nephews. After making the will, the testator sold the farm, and took a mortgage thereon for part of the purchase money, a portion of which remained unpaid at his death. A part of the money paid to the testator was unaccounted for, a part he used for his support, and the remainder he gave to plaintiff to keep for him, who deposited it in bank at interest, where it remained up to the testator's death. The executor has in his hands for distribution but $200 in addition to the sums thus left of the proceeds of sale of the farm; and the testator at no time owned any other real estate. Upon action brought by the executor for construction of the will: Held that the legacy to the niece and nephews was specific, and adeemed by the sale of the farm by the testator, and the avails of such sale, including the amount collected by the executor on the mortgage, would pass to the sister under the bequest to her of all personal property." Sharp Exr's etc. v. McPherson et al., 10 C. C. 181, 6 C. D. 634.

(18)

Jones made his last will and testament, in which he gave his wife all his property, both real and personal, in fee simple and forever. The will was properly signed and witnessed as required by law, but not dated. Subsequently he took the will and in his own handwriting used the following language: "As a codicil to my last will, I desire to change it to read as follows: I give my wife all my property for and during her natural life, and at her death I bequeath the same to my brothers and sisters, share and share alike." Jones dated this writing and signed his name to it, but the same was not witnessed by any person.

In your opinion, was this a codicil to said will and would it in any way affect what is described as the original will?

This was not a valid codicil. A codicil must be exe-

cuted with the same formalities as a will proper. G. C. § 10502. Nor was this sufficient to revoke any part of the will. When a will is to be revoked in whole or in part by a paper writing, such writing must be executed with the formalities of proper will execution. See answer (3).

(19)

(a) How is a codicil to be construed with reference to the will?

(b) A, whose place of residence at the time of his death was Columbus, Ohio, executed his will in Los Angles, California, where he subsequently died.Where is the proper place for the original probate of the will?

(a) A will and codicil are to be taken and construed together as parts of one and the same instrument. A codicil will not be held to revoke the dispositions of a will, further than is clearly expressed or necessarily to be inferred from it. Collier v. Collier's Executors, 3 O. S. 369, Negley v. Gard et al., 20 O. 310.

(b) Columbus, Ohio. The place of last domicile.

"In re Faber's estate (7 N. P. 561) held that a will executed by a citizen of this state, while temporarily residing abroad, is a domestic will, and can be probated here, and the estate administered here, while a foreign will could, of course, only be admitted to record." See also Wilberding v. Miller, 90 O. S. 28, 106 N. E. 665; Manuel v. Manuel, 13 O. S. 458.

(20)

(a) Who can bequeath property in Ohio?

(b) Is the right to transmit property by will a natural right? Give reason for answer.

(a) A person of full age, of sound mind and memory, and not under restraint, who has property, or an interest therein, may give and bequeath it by last will and testament lawfully executed." G. C. §10503.

(b) No. With the exception of one or two states the right to dispose of property by will, is a statutory right only. Deibel's Ohio Probate Manual, § 449.

"It has always been subject to the control of legislative power, and such power is not limited in this state by constitutional provision." Patton v. Patton, 39 O. S. 590, 597.

(21)

By "Item Third" of his will A gave to his intended wife B without her knowledge one-half of his estate. By Item Fourth he gave the residue to his son by a former marriage. After the marriage of A and B he informed her of the provisions of his will, but subsequent thereto he drew a line through Item Third, the words thereafter still remaining

legible. Shortly before his death he directed his wife to tear up and destroy his will, saying that he wished to revoke it. His wife pretended to do this by tearing up a different sheet of paper, but she kept the will intact. She told A that she had destroyed the will, and he died in that belief. Subsequently a child was born to B of this marriage.—

(a) What effect had the marriage on the will?

(b) What effect had the drawing of the line through Item Third?

(c) What was the effect of the testators's direction to his wife to destroy the will, and her fraudulent conduct in relation thereto?

(d) What was the effect of the subsequent birth of another child?

(a) A will is revoked only by complying with the statutes; no statute mentions marriage. Mundy v. Mundy, 15 C. C. 155, 8 C. D. 48 cited 40 Cyc. 1198.

(b) No effect.

"A clause of a will cannot be revoked by the testator drawing ink LINES through the words thereof, with an intent to revoke such clause, but not with an intent to revoke the whole will, and in such case, where all the words of such clause remain legible, the whole will should be admitted to probate, including such erased clause as a valid part of such will." Giffin v. Brooks, 48 O. S. 211, 31 N. E. 743, Aff. 3 C. C. 110, 2 C. D. 64.

A part of a will cannot be revoked by cancellation because the revocation statute, G. C. § 10555, uses the word "it" only, and not also "a part thereof." Idem.

(c) No effect.

"In order to constitute a revocation by tearing, obliterating, cancelling or destroying the same, the sign or symbol of the attempt so to do must be apparent on the instrument purporting to be a will." Kent v. Mahaffey, 10 O. S. 204.

(d) The will is revoked pro tanto. "When, at the time of executing his will, a testator has a child absent and reported to be dead, or having a child at the time of executing the will, afterward has a child who is not provided for therein, the absent child, or child born after executing the will, shall take the same share of the estate, real and personal, that he would have been entitiled to, if the testator had died intestate. G. C. § 10563.

Where a person having a child or children executes his will and thereafter another child is born, for whom no provision is made in the will or by codicil thereto, the estate of testator as to such after-born child is intestate. In such case, if a testator left realty as part of his estate, the after-born child may maintain an action in partition to have set-off to him in severalty his share of such realty. Krueger v. Krueger, 111 O. S. 369.

(22)

(a) Is the contest of the validity of a will a civil action or special proceeding?

(b) Can the validity of a codicil be contested without contesting the will?

(c) What court has original jurisdiction in will contests?

(d) Which party to the contest has the right to open and close the evidence and argument?

(a) A civil action.

"A person interested in a will or codicil admitted to probate in probate court, or court of common pleas on appeal, may contest its validity BY A CIVIL action in the common pleas court of the county in which such probate was had." G. C. § 12079, Niemes v. Niemes, 97 O. S. 145, at p. 150, 119 N. E. 503.

(b) Yes.

"G. C. § 10502 and General Code 12079, construed together, indicate that as to the execution and probate of wills, the term "will," should include codicil, but that in the chapter relating to contests, the two may be regarded as separate testamentary dispositions. Trull v. Patrick, 22 N. P. (N. S.) 385 at p. 388, 31 D. 319.

(c) COMMON PLEAS COURT.

This jurisdiction is original and not appellate. Bradford v. Andrews, 20 O. S. 208.

But the proceeding is in the nature of an appeal from the order of probate. Haynes v. Haynes, 33 O. S. 598.

(d) THE PROPONENTS.

"The party sustaining the will shall be entitled to open and close the evidence and argument. He must offer the will and probate and rest. The opposite party then shall offer his evidence; the party sustaining the will then must offer his other evidence. Rebutting evidence may be offered as in other cases." G. C. § 12085.

(23)

A died leaving three children B, C and D his only heirs at law. His will was duly probated, and the dispositive part thereof (omitting the name) was as follows:

(2) To B and C I give my farm in X Township share and share alike.

(3) To D I give $100 and no more of my estate.

No other devises and bequests were made.

After testator's death it was found that he also owned a farm in Y Township.

(a) How should the farms be divided?

(b) Give reason for answer.

(a) The farm in X Township succeeds to B and C as

a devise, each taking an undivided one-half interest as a tenant in common.

The farm in Y Township succeeds as an inheritance under the intestate statutes (G. C. §§ 8573-8574) to the three children, each taking an undivided one-third interest as a tenant in common.

(b) It is impossible to disinherit an heir as to intestate property by words of exclusion. Such words are not testamentary and therefore ineffectual.

The very nature of a will is to make a disposition of property; if language used does not dispose of property, it cannot be testamentary. Therefore it is ineffectual. Crane v. Doty, 1 O. S. 279; Mathews v. Krisher, 59 O. S. 562, 53 N. E. 52; Holmden v. Craig, 16 C. C. (N. S.) 157, 11 C. D. 461, Aff. in 83 O. S. 483, 94 N. E. 1108.

(24)

Assume again the facts in the preceeding question, and in addition thereto assume that B had received an advancement from A.—

(a) How would such advancement affect B's share in the farm in X Township?

(b) In Y Township?

(a) It would not affect B's share in the farm in X Township.

(b) It would be taken toward B's share in the farm in Y Township. G. C. § 8585 provides that "If any estate, real or personal, has been given by an intestate in his life time as an advancement to any child or children of his, or their descendants, it must be considered a part of the estate of the intestate, so far as it regards the division and distribution thereof among his children or their descendants, and be taken by such child or children or their descendants toward his or her share of the estate."

If a testator has devised and bequeathed a part of his property by will, the statute on the subject of advancements applies, nevertheless, to that part of his property as to which he died intestate. Dittoe v. Cluney, 22 O. S. 436.

(25)

Smith filed suit to set aside the last will of his sister, which had been admitted to probate. The sister had no children at the time she executed the will, but later a child was born alive which died before the mother died.

Is the will valid?

No.

If the testator has no children at the time of executing his will, but afterward has a child living, or born alive after his death, such will shall be revoked, unless provision has been made for such child by some settlement, or he is pro-

vided for in the will, or in such way mentioned therein as to show an intention not to make such provision. No other evidence to rebut the presumption of revocation shall be received. G.C.§ 10561.

Where a testratrix, having no child, made her will, and afterward had a living child, which she survived, Held:

1. That the birth of the child revoked the will.
2. That the fact that the testatrix survived the child did not revive the will. Ash v. Ash, 9 O.S. 383.

(26)

(a) What is meant by residuary legatee? and

(b) What is meant by advancement and are they ever part of the assets of an estate?

(a) Residuary legatee is he to whom the residium of the estate is devised or bequeathed by will. Bouvier's Law Dictionary, p. 2920.

(b) An "advancement" is a term well understood in law to mean an irrevocable gift to a child in anticipation of such child's future share of the parent's estate, to be taken into account on distribution of the estate. Albrecht v. Fischer, 14 App. 195, 198.

Advancements are not part of the assets of an estate. Young v. Roberts, 7 C.C. 105, 107, 3 C.P. 685, 686.

(27)

Can a contract to make a will be specifically enforced during the life of the promisor? Explain.

No.

The testator has his life time, at least during testamentary capacity, to make a will; so, the promisee has no remedy, ordinarily, in the promisor's life time. In any event, equity will not compel one to make a will. Maud v. Maud, 33 O.S. 147; Deibel's Ohio Probate Manual, p. 456, § 571.

No right of action accrues to the promisee until the death of promisor and his failure to comply with agreement. 40 Cyc. 1071.

(28)

John Doyle by his will bequeathed $25,000 to his sister-in-law, Mary Bates, $75,000 to his son, George Doyle, and the residue of his estate to his widow, Ruth Doyle. John Doyle died July 6, 1925, leaving an estate of $200,000. The debts of his estate were less than $5,000. His sister-in-law, Mary Bates, died, intestate, June 18, 1925, leaving two children surviving her, but no widower.

Who gets the $25,000? Explain.

The widow, Ruth Doyle, as residuary legatee.

When a devise of real or personal estate is made to a child or other relative of the testator, if such child or other

relative was dead at the time the will was made, or dies thereafter, leaving issue surviving the testator, in either case such issue shall take the estate devised as the devisee would have done, if he had survived the testator * * *. G.C.§ 10581.

"Other relative" refers to one related by consanguinity and not by affinity. Rea v. Griffin, 21 N.P.(N.S.) 129, 136, 29 D. 174, Aff. 98 O.S. 315.

A lapsed legacy passes to the residuary legatee. Robbins v. Pigg, 29 O.C.A. 153, 156, 35 C.D. 682.

(29)

A made his will October 1, 1909.. At the time of the execution of the will he had two children. He gave his property to his wife for life and the remainder equally to the two children. On June 10, 1911, a third child was born.

A's wife died October 12, 1924.

A never remarried.

A died on September 5, 1926, without having revoked the will of October, 1909, and without having made another will. The three children survived him.

Who gets his estate after the payment of his debts? Give reasons.

The three children each get one-third interest.

When, at the time of executing his will, the testator has a child absent and reported to be dead, or having a child at the time of executing the will, afterward has a child who is not provided for therein, the absent child, or child born after executing the will, shall take the same share of the estate, real and personal, that he would have been entitled to if the testator had died intestate. G.C.§ 10563.

Toward raising the portion of such child, the devisees and legatees shall equally contribute, in proportion to the value of what they respectively receive under the will, unless, in consequence of a specific devise or bequest, or of some other provisions in the will, a different apportionment among the devisees and legatees be found necessary, in order to give effect to the intention of the testator, as to that part of the estate which passes by the will * * *. G.C.§ 10564.

(30)

January 2, 1927, Jesse James assaulted his wife and upon her testimony was sentenced to the Cleveland workhouse for six months. He was infuriated because his wife had appeared against him, and in March, 1927, he made a will in proper form and had it properly witnessed by two other prisoners in the workhouse. His estate consisted of Cleveland real property valued at $20,000 and money in a Cleveland bank in the amount of $15,000.

His will provided that the dower interest of his wife

should be computed and taken out of the $15,000 and that the balance of the money should go to his only child, George. The will further provided that the real estate should be sold and the proceeds given to the City of Cleveland for the purpose of buying books for the prisoners in the workhouse.

In April, 1927, Jesse James attempts to escape from the workhouse and is shot and killed by a guard.

The will is probated.

Can the city get the real estate or proceeds under the will?

State reasons. Be brief!

No.

If a testator dies, leaving issue of his body, or an adopted child, living, or the legal representative of either, and the will of such testator, gives, devises or bequeaths the estate of such testator, or any part thereof, to a benevolent, religious, educational, or charitable purpose, or to this state or to any other state or country, or to a county, city, village, or other corporation, or association in this or any other state or country, or to a person in trust for such purposes, or municipalities, corporations, or associations, whether such trust appears on the face of the instrument making such gift, devise, or bequest or not; such will as to such gift, devise, or bequest, shall be invalid unless it was executed according to law, at least one year prior to the death of the testator. G.C.§ 10504.

(31)

Smith executes his will in proper form. When the witnesses are called in, Smith says: "Just witness my signature, it makes no difference to you what this is." The witnesses sign without knowing that the paper is a will.

Is it a valid will? State reasons. Be brief!

No.

The provisions of G.C.§ 10505 require that the testator shall not only subscribe, but acknowledge the will as HIS WILL, in the presence of two subscribing witnesses. Tims v. Tims, 14 C.C.(N.S.) 273.

(32)

Mary Snyder made a contract before her death to will her entire estate to Rebecca Foltz. After her death an administrator was appointed by the probate court, who was promptly sued by Rebecca Foltz. The petition set forth the contract, the consideration for it, and the other facts, and asked for an order requiring the administrator to turn over to the plaintiff all the property of the decedent. Can the administrator collect from the estate attorney's fees and

other expenses incurred in defending suit, if Rebecca Foltz is successful? Why?

No.

It is the duty of an administrator to preserve the assets of the estate, but it is not his duty to defend an action brought to decide who is entitled to the estate when the only heir at law is represented in the case by counsel and actively contests the action.

An administrator who defends an action for specific performance of a contract, alleged to have been made by his decedent, to will the plaintiff all the residue of decedent's estate, in consideration of care and service for the rest of her life, after payment of all debts and costs, in a case in which the only heir at law is represented by counsel and actively contests the action, cannot, if unsuccessful in defending the action, charge the estate with attorney fees and expenses of litigation incurred in the contest. Foltz v. Boone, 107 O.S. 562, 140 N.E. 761.

(33)

David McCune made a written will in Jamaica, West Indies, properly executed, by which he disposed of his entire estate. Subsequently he removed to Gallipolis, Ohio, and there made a verbal will, which complied with the terms of the statute. Did the verbal will revoke the written will previously made? Why?

No.

Under the statute of Ohio (G.C.§ 10555) a duly executed written will can neither be wholly nor partially revoked by a subsequent nuncupative will. Devisees of McCune v. House, 8 O. 144, 51 A.L.R. 671n.

(34)

Doctor Sweeney made his will upon a printed form. A blank line appeared in the testatum clause following the will in which the name of the testator was supposed to be inserted by typewriter or otherwise. This blank was directly below the line upon which the testator was supposed to sign. The will was properly executed in every way except that signature of the testator was in the blank of the testatum clause instead of on the line for signature. Was the will validly executed? Why?

No.

In a similar case it was held the will was not signed at the end thereof. Sears v. Sears, 77 O.S. 104.

(35)

In Ohio has the testator the right to create an estate by will—(a) Which shall not vest in the beneficiary at the time of the death of the testator but shall vest at some date

subsequent thereto, measured by a definite lapse of time, or the happening of some event? (b) Or must the testator create some intervening freehold upon which to rest such estate?

(a) Yes.

(b) No.

In Ohio, the right of a testator to create an estate by will, which shall not vest in the beneficiary at the death of the testator, but shall vest at some date subsequent thereto, measured by a definite lapse of time, or by the happening of some event, without the creation by the testator of an intervening freehold upon which to rest such estate, has been recognized in Lessee of Thompson v. Hoop, 6 O.S. 481; Niles v. Gray, 12 O.S. 320; Durfee v. MacNeil, 58 O.S. 238, 50 N.E. 721; Heath v. Cleveland, 114 O.S. 535, 548, 151 N.E. 649.

(36)

(a) May a husband deprive his wife of her dower by leaving a will in which he disposed of all of his property to others without making any provision for her? Why?

(b) In charging a jury in a will contest, is the following a correct statement of law: "It is the right of every man, which cannot be taken away from him, to do what he desires with his own, unless the disposition he makes violates some law"?

(a) No.

The interest of a wife in the estate of her husband is a sort of a property right which cannot be taken away from her by any act of her husband, * * *. State v. Sloane, 24 D. 119, 120.

(b) No.

With some qualification it would state the law correctly, but in our judgment, given in this form, it would be misleading to the jury, and is not a correct statement of the law. It leaves out entirely the question of the mental capacity or incapacity of the testator, and the question of undue influence. It is only a person of sound mind and memory—of testamentary capacity—who is under no restraint, who can make a will, as the statute (G.C.§ 10503), in substance provides. And to say to the jury that "It is the right of every man, which cannot be taken from him, to do what he desires with his own, unless the disposition he makes violates some law," where the two chief questions in the case were whether the testator was of unsound mind or not, and whether he was acting under undue influence at the time he made his will, would be misleading, because it leaves out entirely the question of undue influence and mental capacity. Ketteman v. Metzger, 3 C.C.(N.S.) 224, 230, 13 C.D. 61, 68.

(37)

A will provides:

(a) Certain lands are devised "to J. S. for his life and after his death to his heirs in fee." What estate does J. S. take?

(b) That certain lands are devised "to J. S." What estate does J. S. take?

(a) An estate for life.

When lands, tenements, or hereditaments are given by will to a person for his life, and after his death to his heirs in fee, or by words to that effect, the conveyance shall vest an estate for life only in such first taker, and a remainder in fee simple in his heirs. G.C.§ 10578.

(b) A fee.

No words of perpetuity being essential in a will to pass an estate of inheritance if the language used as descriptive of the estate be general and sufficient to comprehend the whole property, without any words of limitation or provision in the will qualifying the interest devised, a fee in the land will pass. Thompson v. Hoop, 6 O.S. 481, 489.

Every devise in a will of lands, tenements, or hereditaments, shall convey all the estate of the devisor therein, which he could lawfully devise, unless it clearly appears by the will that the devisor intended to convey a less estate. G.C.§ 10580.

(38)

(a) Evidence in a will contest showed:

First, that the will after it was prepared was not read by or to the testator; second, that he did not acknowledge in the presence of witnesses that it was his last will and testament; third, that he had no knowledge of what it contained; fourth, that there was no undue influence.

Should such will be set aside? Why?

(b) Does the fact that a wife guides or even dominates her husband in the ordinary affairs of life and acquired ascendency over him, render his will invalid, if, by the provisions of said will, all the property is given to his wife and no portion thereof is given to any of his children?

(a) Yes.

Where, in an action to contest a will, it is evident from the testimony that the will was not read either to or by the testator, that it was not acknowledged by him, and that he had no knowledge of what it contained, it cannot be said that such will was executed by the testator in such a manner as to comply with the requirements of G.C.§ 10505; and the verdict of a jury sustaining such will is not sustained by the evidence and will be set aside. Koch v. Meyers, 7 App. 306.

(b) No.

The fact that a wife guides or even dominates her hus-

band in the ordinary affairs of life, or has acquired an ascendency over him, does not render his will made in her favor invalid. Kornfield v. Kornfield, 22 C.C.(N.S.) 363.

(39)

(a) What is meant by per stirpes and per capita?

(b) A testator devised certain real estate "to the children of Elizabeth Turner and the children of Marie Wilson and Frank Wilson, all said children being my grandchildren, to have and to hold the same for the said grandchildren, their heirs and assigns forever."

On the death of the wife of the testator, who was given a life estate in the real estate in question, there was surviving her two children of Elizabeth Turner and twelve children of Marie Wilson and Frank Wilson. In an action in partition, what would be the share of the heirs named?

(a) When all the persons entitled to share in the distribution are of the same degree of kindred to the deceased person (e. g. when all are grandchildren), and claim directly from him in their own right, and not through an intermediate relation, they take PER CAPITA, that is, equal shares, or share and share alike. But when they are of different degrees of kindred (e. g. some the children, others the grandchildren or the great-grandchildren of the deceased), those more remote take per stirpem, or PER STIRPES, that is, they take respectively the shares their parents (or other relation standing in the same degree with them of the surviving kindred entitled, who are in the nearest degree of kindred to the intestate) would have taken had they respectively survived the intestate. Bouvier's Law Dictionary, Baldwin's Revision.

(b) In an identical case it was held that:

Each of the fourteen grandchildren takes an undivided one-fourteenth of the real estate in question. Broermann, Jr., v. Kessling, 6 App. 7, 28 O.C.A. 321, 30 C.D. 103.

As a general rule, where a testator has left undetermined the proportions in which his beneficiaries are to take, the courts, favoring equality, will direct the distribution to be per capita rather than per stirpes. Supra, 6 App. 7.

(40)

Thomas Williams, the day before his death, signed the following paper:

I, Thomas Williams, being of sound mind and memory and believing myself in imminent danger of death, hereby direct and authorize my father, Henry Williams, to have absolute control and disposition of my body after my death. It is my wish to be buried in Woodland cemetery, Middletown, Ohio, and I so direct.

Signed by said Thomas Williams in our presence and by him acknowledged to be his last will and testament.

Signed by Thomas Williams in our presence and by us in his presence and in the presence of each other, at his request, and acknowledged by him to be his last will, this 5th day of December, 1928.

John Smith,
William Jones.

Following William's death, his wife sought to have the body buried at Union Cemetery, Columbus, Ohio. A controversy arose between the wife of the deceased and the father of the deceased as to the disposition of the body, the father claiming the right to have the body buried at Middletown by virtue of the foregoing writing. Decide the case.

The wife prevails, as this was not a will.

A will has been defined as the means whereby one may dispose of his property at his death. A man cannot by will dispose of his dead body, for there is no property in it, and it does not form a part of his estate.

Where the evidence shows that husband and wife were upon good terms at the time of the death of the husband, and that the wife was discharging her full duty to him, her right to dictate the place of burial will be sustained by the court, even against the expressed wishes of the husband. Herold v. Wagner, 3 N.P.(N.S.) 405, 16 D. 303; Evans v. Evans, 23 D. 375, 377.

(41)

On November 1, 1928, Louise Harris, during her last illness, and unable to write, directed the following instrument to be prepared:

In case I do not recover I want my automobile to be given to my husband, my jewels to my sister, my money in bank to my son, and my household goods to my brother.

Louise Harris (x)
Miss Martha Franklin
Mrs. George Robinson.

The testatrix signed her name by mark, and the following day died. The instrument was offered for probate and later an action filed to contest it as a valid will.

Should the will be sustained?

Yes.

A testamentary clause in a will disposing of the testatrix's property after death, in case she does not recover, is a contingent will, and valid if recovery does not occur.

Where two subscribing witnesses have seen a testatrix subscribe her name to a will by directing another to sign her name thereto in her presence, the testratrix attaching her mark thereto, and the signature so made is then attested and subscribed by said witnesses in the testratrix's presence, the will is properly executed. In such case it is not necessary that the testratrix declare that the instrument is her

will or that she has signed it. Underwood v. Rutan, 101 O.S. 306, 128 N.E. 78.

(42)

(a) A testator devised certain lands to his son, Frank Meadows, in a will, which contained the following provision:

"The land above devised to my son, Frank Meadows, he is to have the use of during his natural life and at his death to vest in fee simple in his children if he shall have any living. If he shall have no children living at his death, then said land shall vest in his legal representatives of the Meadows family."

Frank Meadows died without children, having adopted a child, Thomas Meadows, fifteen years after the death of the testator. An action in partition was instituted by the sons of the testator. What right, if any, has Thomas Meadows?

(b) What difference, if any, would it have made had the testator instead of using the language "legal representatives of the Meadows family," used the words "heirs at law"?

(a) In a case involving these identical facts, it was held:

That the adopted child is not a "legal representative of the Meadows family" and does not take under the will. Albright v. Albright, 116 O.S. 668.

(b) In such a case the adopted child would have taken the property.

As the will in Smith v. Hunter, 86 O. S. 16, specified that the remainder interest in the property in question should pass to the "heirs at law" of the life tenant, and as the statute appointed adopted children to succeed to the estate of their adopting parents in case of intestacy, this court was undeniably right in holding that under that record the term "heir at law" included adopted children. 116 O.S. 668, 676.

(43)

Henry Miller, a citizen of Newark, Ohio, of German birth and unable to speak or write the English language, prepared a paper writing in German and executed the same before two witnesses. Following his death, the paper writing was offered for probate and a suit to contest the same was filed. German scholars were called by both sides to interpret the paper writing into the English language, and the testimony was conflicting in their translation.

Should the paper writing be sustained as a will?

No.

A court will not speculate as to the intention of a testator whose will was written in a foreign language and the scholars who were called as witnesses did not agree in their

translations, but in such a case the provisions of the law for distribution of the property of a decedent will be applied. Walker v. Burtscher, 5 App. 388, 26 C.C.(N.S.) 172, 61 B. 407.

(44)

On January 1, 1899, James Mills, then being the father of three children, executed a last will and testament. On February 1, 1900, a fourth child, Harry Mills, was born to James Mills. In March, 1922, James Mills died without having added a codicil to his will, or without having made any provision for Harry Mills. James Mills left as his heirs at law his four children surviving him.

Harry Mills instituted an action to partition the real property.

Can he maintain his action?

Yes.

Where a person having a child or children executes his will and thereafter another child is born, for whom no provision is made in the will or by codicil thereto, the estate of the testator as to such after-born child is intestate.

In such case, if the testator left realty as part of his estate, the after-born child may maintain an action in partition to have set off to him in severalty his share of such realty. Krueger v. Krueger, 111 O.S. 369.

DESCENT OF REAL PROPERTY IN OHIO

A series of charts showing the order of descent of ancestral and non-ancestral realty under the Ohio General Code.

For a more exhaustive treatment of the subject with citations of leading cases and for an analysis of every Act effective since the Ordinance of 1787, see Kinney's Descent of Real Property in Ohio.

ANCESTRAL REALTY

PERSON DYING LEAVING	Widow or widower takes	Children or their legal representatives take
Widow or widower, no children or their legal representatives	ALL for life (G. C. §8573-2)	
Widow or widower, and children or their legal representatives.	Life interest in one-third of real estate (G. C. §8606).	ALL subject to widow's or widower's dower. (G. C. §8573-1)
Children or their legal representatives, no widow or widower.		ALL (G. C. §8573-1).
Parents and brothers or sisters, no widow or widower, no children or their legal representatives.		
Parents, no brothers or sisters, no widow or widower and no children or their legal representatives.		
Brothers and sisters, no widow or widower, no children or their legal representatives and no parents.		

Descent and Distribution in Ohio

Parents and survivor of them take	Brothers and sisters or their legal representatives take	Ancestor from whom estate came takes
ALL for life after death of widow or widower (G. C. §8573-3).	ALL after death of widow or widower and parents provided that they are of blood of ancestor from whom estate came whether they be of whole or half blood of intestate. (G. C. §8573-3)	
ALL for life. (G. C. §8573-3).	ALL after death of parents provided they are of blood of ancestor from whom estate came, whether they be of whole or half-blood of intestate. (G. C. §8573-3)	
ALL for life. (G. C. §8573-3)		ALL after death of parents. (G. C. §8573-4)
	ALL, provided they are of blood of ancestor from whom estate came, whether they be whole or half-blood of intestate. (G. C. §8573-3)	

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ANCESTRAL REALTY—Continued

PERSON DYING LEAVING	Ancestor from whom estate came, takes	Ancestor's children or their legal representatives take
No widow or widower, no children or their legal representatives, no parents, no brothers or sisters of blood of ancestor from whom property came whether of whole or half-blood of intestate.	ALL. (G. C. §8573-4)	
No widow or widower, no children or their legal representatives, no parents, no brothers or sisters of blood of ancestor, from whom property came, no ancestor from whom estate came.		ALL (G. C. §8573-5)
No widow or widower, no children or their legal representatives, no parents, no brothers or sisters of blood of ancestor from whom property came, no ancestor from whom estate came, and no children of ancestor or their legal representatives.		
No widow or widower, no children or their legal representatives, no parents, no brothers or sisters of blood of ancester from whom property came, no ancestor from whom estate came, no children of ancestor or their legal representatives, no husband or wife relict of ancestor, who is a parent of intestate.		
None of the foregoing and no brothers and sisters of ancestor or their legal representatives.		
None of the foregoing and no brothers and sisters of half-blood of intestate or their legal representatives not of blood of ancestor.		

Descent and Distribution in Ohio

Husband or wife relict of ancestor, if a parent of intestate takes	Brothers and sisters of ancestor or their legal representatives take	Brothers and sisters of half blood of intestate or their legal representatives tho not of blood of ancestor take	Next of kin of intestate of blood of ancestor or their legal representatives take
ALL (G. C. §8573-5)			
	ALL (G. C. §8573-5)		
		ALL (G. C. §8573-5)	
			ALL (G. C. §8573-6)

ANCESTRAL REALTY—Continued

PERSON DYING LEAVING ↘	Husband or wife relict of intestate takes	Next of kin of intestate tho not of the blood of the ancestor takes
None of the foregoing and no next of kin of blood of ancestor or their legal representatives.	ALL (G. C. §8575)	
None of the foregoing and no widow or widower of intestate.		ALL (G. C. §8575).
None of the foregoing and no next of kin of intestate not of blood of ancestor.		
None of the foregoing and no children of deceased husband, or husbands, wife or wives of intestate, whose marriage with intestate is not annulled prior to death, or their legal representatives.		
None of foregoing and no brothers and sisters of husband or wife of intestate whose marriage with intestate is not annulled prior to death or their legal representatives.		
None of the foregoing and no next of kin of deceased husband or husbands, wife or wives of intestate whose marriage with intestate is not annulled prior to death.		

Descent and Distribution in Ohio

Children of deceased husband or husbands, wife or wives of intestate whose marriage with intestate is not annulled prior to death or their legal representatives take	Brothers and sisters of deceased husband or wife of intestate, whose marriage with intestate is not annulled prior to death or their legal representatives take	Next of kin of deceased husband or wife of intestate whose marriage with intestate is not annulled prior to death, takes	State of Ohio takes
ALL (G. C. §8576).			
	ALL (G. C. §8576).		
		ALL (G. C. §8576).	
			ALL (G. C. §8576).

NON-ANCESTRAL REALTY

PERSON DYING LEAVING	Widow or widower takes	Children or their legal representatives take
Widow or widower, no children or their legal representatives.	ALL (G. C. §8574-2)	
Widow or widower, and children or their legal representatives.	Life-interest in one-third of real estate; one-half of first $400; one-third of remainder of personal property. (G. C. §§8592 & 8606).	Real estate subject to widow's or widower's dower; one-half of the first $400; two-thirds of remainder of personal property. (G. C. §8574-1).
Children or their legal representatives, no widow or widower.		ALL (G. C. §8574-1)
Parents and brothers and sisters and their legal representatives, no widow or widower.		
Parents, no brothers and sisters, no widow or widower and no children or their legal representatives.		
Brothers and sisters, no widow or widower, no children or their legal representatives and no parents.		
No brothers or sisters, no widow or widower, no children or their legal representatives and no parents.		

Parents and survivor of them take	Brothers and sisters and their legal representatives take	Next of kin to and of blood of intestate and legal representatives take
ALL for life. (G. C. §8574-3)	ALL (After death of parents). Those of half-blood inherit only if there are none of whole blood. (G. C. §8574-3 and 4).	
ALL. (G. C. §8574-5).		
	ALL Those of half-blood inherit only if ther are none of whole blood. (G. C. §8574-3).	
		ALL (G. C. §8574-6).

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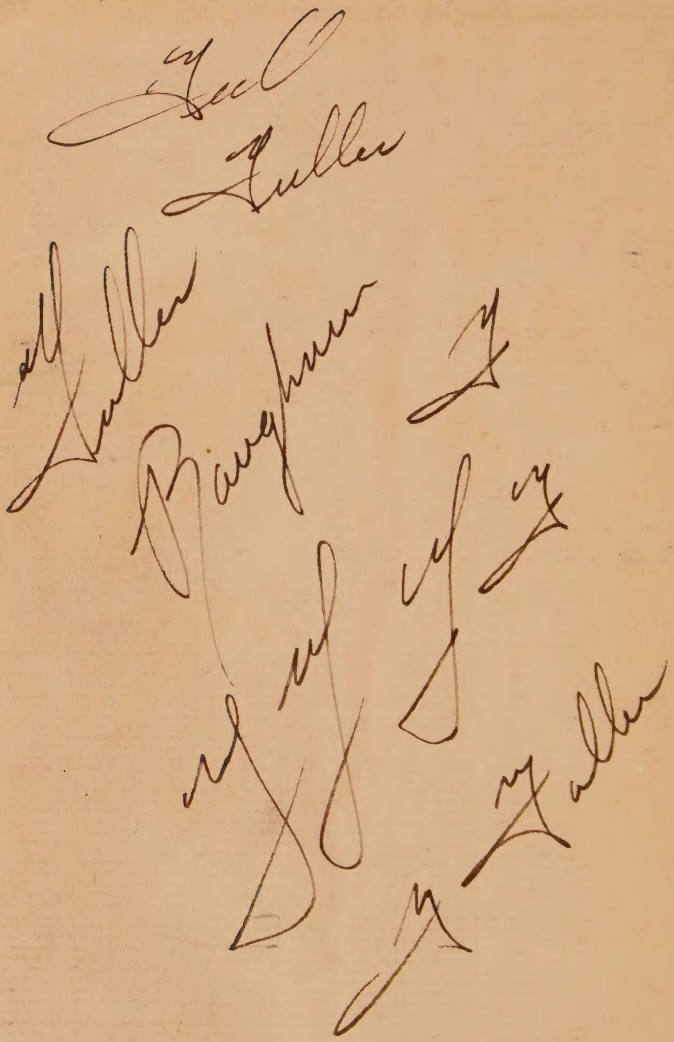
NON-ANCESTRAL REALTY—Continued

PERSON DYING LEAVING ↓	Children of deceased husband or husbands, wife or wives of intestate whose marriage with intestate is not annulled prior to death, or their legal representatives take	Brothers and sisters of deceased husband, or wife of intestate whose marriage with intestate is not annulled prior to death or their legal representatives take
No brothers or sisters, no widow or widower, no children or their legal representatives, no parents and no next of kin.	ALL (G. C. §8576).	
No brothers or sisters, no widow or widower, no children or their legal representatives, no parents, no next of kin to and of blood of intestate and legal representatives and no children of any deceased husband or wife whose marriage with intestate was not annulled prior to death or their legal representatives.		ALL (G. C. §8576).
No brothers or sisters, no widow or widower, no children or their legal representatives, no parents, no next of kin to and of blood of intestate and legal representatives and no children of any deceased husband or wife whose marriage with intestate was not annulled prior to death or their legal representatives and no brothers or sisters of deceased husband or wife of the intestate whose marriage with the intestate is not annulled prior to death, or their legal representatives.		
None of the foregoing and no next of kin of the deceased husband or wife of the intestate whose marriage with the intestate was not annulled prior to death.		

Next of kin of deceased husband or wife of intestate whose marriage with intestate is not annulled prior to death takes	State of Ohio takes	
ALL (G. C. §8576).		
	ALL (G. C. §8576).	See next page for the "Half and Half Statute". (G. C. §8577.)

THE HALF AND HALF STATUTE

"When the relict of a deceased husband or wife dies intestate and without issue, possessed of any real estate or personal property which came to such intestate from a former deceased husband or wife by deed of gift, devise or bequest, or under the provisions of Section 8574, then such estate, real and personal, shall pass to and vest in the children of such deceased husband, or wife, or the legal representatives of such children. If there are no children or their legal representatives living, then such estate, real and personal, shall pass and descend, one-half to the brothers and sisters of such intestate, or their legal representatives, and one-half to the brothers and sisters of such deceased husband or wife from which such personal or real estate came, or their legal representatives.

When such relict dies intestate and without issue, possessed of any real or personal property which came to such intestate under the provisions of the fifth subdivision of Section 8573, such estate shall pass and descend, one-half to the brothers and sisters of such intestate, or their legal representatives, and one-half to the brothers and sisters of such deceased ancestor of whom said intestate is the relict, or their legal representatives." G. C. § 8577.